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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,

Appellants,

v.

DONALD BRADY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

OPINION BELOW

The Memorandum and Order of the district court is reported at 436 F. Supp. 1361.¹

JURISDICTION

The Memorandum and Order of the court below was filed on September 16, 1977. See Appendix (hereinafter

¹A related case involving the identical appellees and a body of evidence which, in its entirety, is part of the record in the instant case, is reported as *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975). The relationship of *Aldridge* to the instant case is discussed *infra*, at 7-8, 11-12.

"A.") at 6. That court's judgment, dated September 19, 1977, was filed on September 20, 1977 (A.6, 56). This Court's jurisdiction is invoked under 28 U.S.C. §1253 (1970).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §3-813 (1977 Cum. Supp.)

(a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. After July 1, 1978 the judges of the Circuit Court of Prince George's County may not appoint or continue the appointment of masters for juvenile causes. The standards expressed in §3-803, with respect to the assignment of judges, are applicable to the appointment of masters. A master, at the time of

his appointment and thereafter during his service as a master, shall be a member in good standing of the Maryland Bar. This subsection does not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.

(b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

(d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them. Detention or shelter care may be ordered by a master pending court review of his findings, conclusions and recommendations.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, if all parties and the court agree, the hearing may be on the record.

Maryland Rules of Procedure, Rule 911 (1977)

a. Authority

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. Report to the Court.

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. Review by Court if Exceptions Filed.

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party

other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. Review by Court in Absence of Exceptions.

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions.

QUESTION PRESENTED

Do Ann. Code Md., Cts. & Jud. Proc. Art., §3-813(c) (1977 Cum. Supp.) and Ann. Code Md., Md. R. P., Rule 911.c (1977), to the extent that they permit the State of Maryland to except to a juvenile court master's finding of non-delinquency and try the juvenile a second time before the juvenile court judge, violate the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment?

STATEMENT

A. Procedural History

This case was filed on November 25, 1974, pursuant to 42 U.S.C. §1983 (1970) alleging deprivation of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The appellees brought the action on behalf of themselves and other similarly situated persons pursuant to Fed. R. Civ. P. 23.² Since appellees sought to have declared unconstitutional a rule legislative in nature,³ and to enjoin a state officer from enforcing a policy of state wide application,⁴ the case was filed pursuant to 28 U.S.C. §2281 (1970).⁵ The thrust of appellees' complaint

²Appellees agree with appellants that the action of the court below granting appellees' request for class certification prevents the case from becoming moot. Brief of Appellants at 7 n.4. See *Sosna v. Iowa*, 419 U.S. 393 (1975); *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Zablocki v. Redhail*, - U.S. -, 98 S. Ct. 673 (1978); *Satterwhite v. City of Greenville, Tex.*, 557 F.2d 414 (5th Cir. 1977), *rehearing en banc granted*, (Nov. 1, 1977). Moreover, wholly aside from the effect on mootness of the various intervenors, see 436 F. Supp. at 1362-63, the original plaintiffs in the case had not received all the relief to which they were entitled prior to the decision of the court below. See Plaintiffs' Memorandum in Response to Motion to Dismiss, filed in the court below on December 8, 1975, at 15-22.

³See *Roscoe v. Butler*, 367 F. Supp. 574, 575-76 (D. Md. 1973).

⁴*Id.* See also *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 92-95 (1935); *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n.2 (1972); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 82 n.6 (1975); *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975); Ann. Code Md., Art. 10, §34 (1977 Cum. Supp.).

⁵28 U.S.C. §2281 has since been repealed. See Act of Aug. 12, 1976, Pub. L. No. 94-381, §1, 90 Stat. 1119. Section 7 of that law provides that it shall not apply to any action which had commenced on or prior to the date of enactment.

was that a provision of the Maryland Rules of Procedure⁶ denied them the right to be free of multiple prosecutions or punishments, in violation of constitutional double jeopardy protections, by permitting the State to prosecute them before a juvenile court judge at a *de novo* hearing after they had been found not guilty⁷ of precisely the same offense⁸ by a juvenile court master.

Simultaneously with the filing of the §1983 action which sought declaratory and injunctive relief, each of the appellees filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland.⁹ Each alleged that he had been illegally restrained of his liberty because a juvenile court judge had found him guilty

⁶The Maryland Rules of Procedure are adopted by the state's highest court, the Court of Appeals, pursuant to Constitution of Maryland, Art. IV, §18A (1977).

⁷Under juvenile court rules, a child who pleads not guilty is said to "deny"; if he pleads guilty, he "admits". See Rule 907, Maryland Rules of Procedure (1977) which appears in Vol. 9B, Annotated Code of Maryland. All further references to rules will be to the Maryland Rules of Procedure, 1977 edition, unless otherwise indicated.

⁸At the time the complaint was filed, the offending provision was Rule 908.e (1971). The rule was subsequently amended, effective July 1, 1975, and became Rule 910 (1975 Cum. Supp.). See 2 Md. Reg. 967, 969-70 (1975). The nature of and reasons for the amendments are discussed *infra*, at 14-15. The rule was amended again, effective Jan. 1, 1977, with minor changes that have no bearing on the instant litigation. See 3 Md. Reg. 1385 (1976). The provision has been renumbered as Rule 911 (1977).

⁹The habeas corpus petitions were filed on November 26, 1974, one day after the instant case was filed. See the docket sheets prepared by the Office of Clerk, United States District Court for the District of Maryland, in Nos. T-74-1300-08, which are included in Vol. I of the original record in this Court.

and sentenced him to either probation or incarceration following a *de novo* trial which took place because the state's attorney had excepted to the results of an earlier trial in which a juvenile court master had found him to be not guilty.¹⁰ The habeas cases were filed in addition to the §1983 case because neither action alone could obtain the full relief which the appellees desired. *Cf. Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The instant case and the companion habeas corpus litigation had their genesis in lengthy state court proceedings which commenced in 1972. Since that litigation has been the subject of major discussion and analysis by both the courts and the parties in the federal cases,¹¹ a brief summary of that history is helpful.

¹⁰In the cases of three of the appellees, the habeas corpus petitions were filed prior to the *de novo* hearings before the judge but after the state's attorney had filed exceptions to the juvenile court masters' determinations that the appellees were not guilty. By agreement reached between counsel and the juvenile court, the *de novo* hearings in those three cases were delayed pending the outcome of the federal court litigation. See the transcript of proceedings in the instant case and the companion habeas corpus cases held on March 18, 1975, at 270. The testimony of witnesses in the instant case was taken on March 17-18, 1975, April 7, 1975, and April 19, 1976. The 1975 testimony is contained in three separate volumes, all of which are consecutively numbered from 1-415. The 1976 testimony is in a fourth volume which is separately numbered from 1-46. Excerpts from the transcripts have been reproduced in the Appendix.

When references are made to portions of the transcripts which have not been reproduced in the Appendix, the 1975 transcripts will be referred to as "T.I.", and the 1976 transcript will be referred to as "T.II."

¹¹See the opinion of the court below, 436 F. Supp. at 1366; *Aldridge v. Dean*, 395 F. Supp. 1161, 1165-69, 1172 (D.Md. 1975); Brief of Appellants at 16, 17.

The state litigation commenced when a juvenile respondent, William Anderson, was tried and found not guilty before a master of the Baltimore City juvenile court.¹² The state's attorney filed written exceptions to the master's findings and requested a *de novo* hearing before the juvenile court judge. Following the filing of a motion to dismiss the exceptions, and after extensive briefing and argument on the allegation that Anderson was threatened with being placed twice in jeopardy for the same offense, the juvenile court judge ruled that double jeopardy protections apply to juvenile court proceedings,¹³ and that those protections are violated when the state seeks a *de novo* trial before the juvenile court judge after having lost at a trial before the master.¹⁴ *Matter of Anderson*, No. 158187 (Cir. Ct. of Balto. City, Div. for Juv. Causes, Aug. 1, 1973).

On appeal, the Court of Special Appeals of Maryland reversed. *Matter of Anderson*, 20 Md. App. 31, 315 A.2d

¹²The correct name of the Baltimore City juvenile court is the Circuit Court of Baltimore City, Division for Juvenile Causes (hereinafter referred to as the "juvenile court") (T.I.18).

¹³The juvenile court judge rendered his opinion nearly two years before this Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975), which extended double jeopardy protections to juveniles. At the time he made that ruling, existing Maryland case law rejected the application of double jeopardy principles to juveniles under the theory that juvenile courts provided civil remedies and did not punish one for the commission of a crime. See *Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958); *Johnson v. State*, 3 Md. App. 105, 238 A.2d 286 (1968).

¹⁴Since the juvenile court judge's memorandum opinion, dated August 1, 1973, is not reported, appellees have lodged a copy with the Office of the Clerk for the convenience of this Court.

540 (1974).¹⁵ Assuming for purposes of its decision that juvenile proceedings fell within the ambit of double jeopardy protections, *see* 20 Md. App. at 43-44, 315 A.2d at 547, the court concluded that the entire process from the beginning of the master's trial¹⁶ to the end of the judge's *de novo* hearing constituted one continuous jeopardy. Thus, even if the initial jeopardy attached at the commencement of the adjudicatory hearing before the master, the court ruled that the action of the judge in the second hearing did not "put the child twice in jeopardy because there has been no culmination of the first jeopardy." 20 Md. App. at 47, 315 A.2d at 549 (footnote omitted).

On certiorari review by the Court of Appeals of Maryland, the intermediate appellate court's decision was affirmed, although on different grounds. Whereas the Court of Special Appeals had assumed that jeopardy attached at the beginning of the master's hearing and simply continued, the Court of Appeals concluded that the "hearing before a master is not such a hearing as places a juvenile in jeopardy." *Matter of Anderson*, 272 Md. 85, 106, 321 A.2d 516, 527 (1974). Central to the court's position was the view that a master is a ministerial officer, not a judicial

¹⁵At the time the State appealed *Anderson*, it also appealed the dismissal of several exceptions that had been pending during the course of the *Anderson* trial court litigation and that were dismissed by the trial judge after he rendered his decision. Two of the parties who joined *Anderson* in the Court of Special Appeals, Donald Brady and Michael Epps, are two of the appellees in the instant case.

¹⁶In Maryland, the juvenile court trial is known as the adjudicatory hearing. *See* Ann. Code Md., Cts. & Jud. Proc. Art., §3-819 (1977 Cum. Supp.); Rule 914. All further references to statutes will be to the Annotated Code of Maryland, Courts and Judicial Proceedings Article, 1977 Cumulative Supplement, unless otherwise indicated.

officer, and is entrusted with none of the judicial powers of the state.¹⁷

After the parties unsuccessfully sought review in this Court,¹⁸ appellees filed the instant case and the companion habeas corpus petitions.¹⁹ By agreement of the parties, hearings were first held in the habeas corpus cases.²⁰ The parties further agreed that all evidence taken in the habeas cases would be included as part of the evidence in the

¹⁷At fn.136 *infra*, appellees point out that the Maryland Court of Appeals has been inconsistent on the issue of whether a master is or is not a judicial officer.

¹⁸Three of the juveniles in the *Anderson* litigation filed an appeal in this Court which was dismissed for want of a substantial federal question. *Epps v. Maryland*, 419 U.S. 809 (1974). *Anderson*, who was represented by other counsel, filed a petition for writ of certiorari which was denied. *Anderson v. Maryland*, 421 U.S. 1000 (1975).

¹⁹During the time that appellees Brady and Epps were concluding their state court appeals and preparing their federal court cases, the State of Maryland filed juvenile court petitions charging the remaining seven appellees, Aldridge, Campbell, Fenwick, Love, McLean, Stewart, and Witherspoon. *See* plaintiffs' exhibits (hereinafter "P.Ex.") 1(A), 3(F), 5(N), 6(U), 6(V), 7(N), 8(S), and 9(V). As a result of subsequent actions adverse to their double jeopardy interests, *see infra*, at 17-20, they joined the federal court litigation.

All of plaintiffs' exhibits filed in the court below, except for Nos. 72-74, are included in Vol. VII-X of the original record in this Court. P.Ex. 72-73 are included as attachments to pleading no. 34, and P.Ex. 74 is included as an attachment to pleading no.37, all of which are located in Vol. II of the original record in this Court. In addition, P.Ex. 39-42 are reprinted in full at A.29, 32, 33, and 34, respectively. P.Ex. 46 and 49 are reprinted in part at A.35 and 39, respectively.

²⁰By letter of April 17, 1975, Judge Roszel Thomsen, who presided at the habeas corpus hearings and was originally a member of the three-judge district court in the instant case, informed counsel that the three judges were of the opinion that the habeas cases should proceed to final determination before the three-judge court commenced hearings.

instant case, subject to any rulings by the three-judge court respecting relevancy (T.I.2).²¹

Following the presentation of extensive evidence in the habeas cases,²² the court rendered an opinion on June 12, 1975, concluding that the rights of a juvenile are violated under the Fourteenth Amendment when,

after a master has held an adjudicatory hearing and has announced his finding "charge not sustained", the state is allowed to file exceptions to the finding of the master and to obtain a de novo adjudicatory hearing before a judge on the question of whether the juvenile is delinquent by reason of the alleged act. *Aldridge v. Dean*, 395 F. Supp. 1161, 1172 (1975).

In accordance with its opinion, the court entered orders on June 24, 1975, granting the petitions for writs of habeas corpus for the six appellees who were then improperly in custody as a result of being placed in jeopardy a second time.²³ The respondents in the habeas cases took no appeal.²⁴

²¹A copy of a joint stipulation of counsel to that effect is included in the pleading file in each of the nine habeas cases. See pleading no. 8 in Vol. I of the original record in this Court. The three-judge court did not exclude any of the evidence that had been introduced in the habeas corpus cases. Hence, the record in the instant case consists of all evidence taken in both the habeas and the three-judge court cases. See the opinion of the court below, 436 F. Supp. at 1363.

²²That evidence is discussed *infra*, at 23-30, 68-76.

²³The habeas petitions of the three juveniles who had not yet been tried a second time were denied without prejudice to refile them if the State should press for second prosecutions.

²⁴In conformity with normal habeas corpus practice, the persons named as respondents in the habeas cases, unlike the appellants in the instant case, were the persons having immediate custody of the appellees. The Maryland Office of the Attorney General, however, served as counsel and handled all of the proceedings for the appellants in the instant case and for the respondents in the habeas corpus cases.

Shortly before the habeas corpus cases were decided, the Maryland General Assembly passed,²⁵ and the Governor signed,²⁶ a new juvenile causes statute²⁷ which became effective on July 1, 1975.²⁸ Unlike the statute which it replaced,²⁹ the new juvenile law included a provision, §3-813(c), which authorizes any party³⁰ to except to the findings of the master and seek a hearing *de novo* or on the record before the judge.³¹ That section provides in pertinent part:

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing *de novo* or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

²⁵On April 5, 1975.

²⁶On May 15, 1975.

²⁷1975 Md. Laws, Ch. 554.

²⁸*Id.* at §5.

²⁹Cts. & Jud. Proc. Art., § §3-801-42 (1974).

³⁰The new statute defined "party" to include "the petitioner". See §3-801(q). Another section of the statute made clear that "the petitioner" in a delinquency proceeding is the state's attorney. See §3-812(b).

³¹The former juvenile causes statute, see *supra*, at fn.29, did not speak to the issue of the right of any party to except to the findings of masters. Indeed, it contained no reference whatever to the use of masters in juvenile court. As a consequence, the appellees in their original complaint in the instant case and the petitioners in the habeas cases confined their legal attack to the relevant provision in the Maryland Rules of Procedure.

After the legislature passed the new statute, the Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals drafted new juvenile court rules to become effective simultaneously with the new statute. A draft of those new rules was published on June 11, 1975.³² The text of proposed Rule 910.e tracked the new statute, providing, *inter alia*, that "the party who files exceptions may elect a hearing de novo or a hearing on the record."³³ The day after the draft rules were published, the habeas corpus cases were decided. *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975).

Two weeks later, a revised draft of the rules was published,³⁴ accompanied by an order of the Court of Appeals of Maryland adopting them, effective July 1, 1975. Subsection 910.e was substantially redrafted to provide, in pertinent part:³⁵

[[The]] A party who files exceptions, *other than the State*, may elect a hearing de novo or a hearing on the record. *If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection.*

In addition, other portions of Rule 910 were amended to insert the word "proposed" immediately before the phrase

³²See 2 Md. Reg. 909 *et seq.*

³³*Id.* at 912.

³⁴See 2 Md. Reg. 967 *et seq.*

³⁵*Id.* at 970. The words in double brackets were removed from the June 11 draft and the words that are italicized were added.

"findings of fact, conclusions of law, recommendations."³⁶

On July 17, 1975, appellants moved to dismiss the instant case as moot, alleging that the alteration in the juvenile court rules caused them to conform to the opinion in *Aldridge v. Dean*.³⁷ Appellees then obtained leave to file a supplemental complaint in which they alleged that the offending rule had been amended but was still unconstitutional for the same reasons previously urged. They further alleged that the new statutory provision which permitted the state's attorney to request a *de novo* hearing before the juvenile court judge also violated their double jeopardy rights.

After additional evidence was taken in April and May, 1976, primarily for the purpose of updating the record developed at the habeas corpus hearing the previous year, the court below unanimously ruled unconstitutional the provisions of §3-813 and Rule 911.c,³⁸ to the extent that those provisions permit the State to except to a master's

³⁶See the discussion *infra*, at 56-57. The only other change made that is relevant to the instant litigation was in subsection 910.f, which provided that the judge could, on his own motion, order a hearing. The June 11 draft permitted the hearing to be *de novo*, while the final version permitted additional evidence to be introduced only if the parties raised no objections.

³⁷Inexplicably, appellants also stated in their motion to dismiss that the new rules were amended to conform with the new statute. In fact, as the court below notes, the rule is in direct conflict with §3-813(c), since the former prohibited *de novo* hearings before the judge when review is requested by the state or initiated on the judge's own motion, while the latter provision had no such restriction. 436 F. Supp. at 1365. See discussion *infra*, at fn.39.

³⁸As previously noted, see *supra*, at fn. 8, revisions in the juvenile court rules, effective January 1, 1977, resulted in Rule 910 becoming Rule 911.

adjudicatory or dispositional findings and seek a new hearing before a juvenile court judge.³⁹ Notice of appeal to this Court was filed on October 14, 1977, and probable jurisdiction was noted on November 28, 1977. 98 S. Ct. 501.

B. Facts

1. The Appellees

Between December, 1972, and August, 1974, juvenile court petitions were filed against the original nine appellees⁴⁰ charging them with a variety of offenses which,

³⁹While noting that the statute and rule conflict respecting the *de novo* - on the record issue, the court below viewed the rule as controlling since it was approved by the Court of Appeals of Maryland after the new statute was passed by the legislature and signed by the Governor. Under Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule making power of the Court of Appeals as provided in the Constitution of Maryland, Art. IV, §18A (1977), and §1-201 (1974). See *County Fed. S. & L. v. Equitable S. & L.*, 261 Md. 246, 274 A.2d 363 (1971). Likewise, a statute enacted subsequent to a rule and contrary to it would prevail. See *Hensley v. Bethesda Metal Co.*, 230 Md. 556, 188 A.2d 290 (1962). While the reasoning of the court below as to why the rule prevails is logical and counsel have expressed agreement with that position, the matter is not completely free from doubt since both the statute and the rule became effective on the same day, July 1, 1975. As explained *infra*, at 86-92 appellees believe that each version is equally unconstitutional. However, appellees fully support the order and judgment of the court below which operates against both the statute and the rule since, even if the rule does now prevail, if it were repealed the statute would become fully operational. See *Scott & Wimbrow v. Wisterco, Inv., Inc.*, 36 Md. App. 274, 281 n.3, 373 A.2d 965, 970 n.3 (1977). For this reason, appellees will demonstrate how the evidence and the relevant law condemn both the statute and the rule.

⁴⁰See P.Ex. 1(A), 2(N), 3(F), 4(N), 5(N), 6(U), 6(V), 7(N), 8(S), and 9(V).

collectively, included destruction of property, breaking and entering, assault with intent to murder, possession of a deadly weapon, robbery, robbery with a deadly weapon, and simple assault.⁴¹ Each appellee was tried before a juvenile court master,⁴² and in each case except that of appellee Stewart, the master concluded at the end of the adjudicatory hearing that the charges were not sustained.⁴³ Stewart was found to have committed a delinquent act and was placed on probation.⁴⁴

The State of Maryland filed exceptions which sought new trials before the juvenile court judge in each case except Stewart's where the request was for a new disposition hearing.⁴⁵ The basis for the State's exceptions varied. In the cases of appellees Brady, Epps, Love, McLean, and

⁴¹*Id.* See also P.Ex. 49. This exhibit summarizes, for each of the nine original appellees, 1) the date and nature of the alleged offense, 2) the date of the trial before the master and the master's name, 3) the names of the witnesses testifying before the master and the substance of that testimony, 4) the master's finding and the basis for it, and 5) the name of the assistant state's attorney who filed exceptions to the master's finding and his basis for filing the exceptions.

⁴²Appellees Aldridge and Campbell were tried together as co-respondents. See *Id.* at 8.

⁴³*Id.* at 3, 4, 8, 12, 13, and 15. At the conclusion of the adjudicatory hearing (trial) in a delinquency case, findings are made only respecting the commission of a "delinquent act," which is defined as an act which would be a crime if committed by an adult. See §3-801(k). If the delinquent act is found to have been committed, a separate disposition hearing is held, unless waived by the parties, to determine whether the respondent is a "delinquent child." Under Maryland law, a "delinquent child" is a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation. See §§3-801(1), 3-820.

⁴⁴See P.Ex. 8(M), 49 at 7.

⁴⁵See P.Ex. 1(I), 2(E), 3(A), 4(I), 5(D), 6(N), 7(G), 8(K), and 9(N).

Witherspoon, the state's attorney was dissatisfied with the master's view on the weight of the evidence. In *Brady* the state's attorney disagreed with the master's doubts concerning the reliability of an eye witness identification.⁴⁶ In the *Epps* case, the state's attorney disagreed with the master's conclusion that the uncorroborated evidence of an accomplice was insufficient to demonstrate guilt.⁴⁷ The exception in the *Love* case was taken because the state's attorney believed that testimony of a police officer concerning an alleged confession given by the juvenile was sufficient to prove guilt.⁴⁸ In the *McLean* case, the state's attorney disagreed with the master's finding that the complaining witness' identification of the respondent was too hazy to permit a finding of guilt, especially since it lacked corroboration.⁴⁹ The exception in the *Witherspoon* case was taken because the state's attorney disagreed with the master's conclusion that testimony given by respondent's mother concerning papers her son signed at the police station created doubts concerning whether the respondent had made an intelligent waiver of counsel (A.42).⁵⁰

In the remaining cases where the State filed exceptions from masters' not guilty findings, it was dissatisfied with legal rulings made by the masters. In the *Fenwick* case, the master concluded that the evidence did not support the

⁴⁶See P.Ex. 49 at 15.

⁴⁷The state's attorney also felt that a document should have been admitted and that the master should have given weight to testimony concerning it. *Id.* at 14.

⁴⁸*Id.* at 12.

⁴⁹*Id.* at 16. The *McLean* case is discussed in more detail *infra*, at 85-86.

⁵⁰The *Witherspoon* case is discussed in more detail *infra*, at 83-85.

charge, noting that the State had filed the wrong charge. The state's attorney disagreed because, in his view, the master erred as a matter of law in concluding that associates, aiders, or abettors could not be charged as principals in connection with the offense in question.⁵¹ In the *Aldridge* and *Campbell* cases, the state's attorney objected to the refusal of the master to allow him to call a certain witness in rebuttal since, in the master's view, that witness should have been offered as part of the State's case in chief.⁵²

In the *Stewart* case, the master, after finding that the child had committed the offense, placed him on probation. In doing so, he was influenced by the fact that the victim had initiated the fight which resulted in the charges against Stewart while he was in Stewart's own home. The state's attorney excepted because he believed that Stewart used excessive force and that the offense may have been premeditated.⁵³

Aldridge, Campbell, Fenwick, Witherspoon, and McLean were subsequently tried before the juvenile court judge who found them guilty⁵⁴ and committed all but Fenwick to a juvenile institution.⁵⁵ Fenwick was placed on probation.⁵⁶ Following an initial hearing before the judge,

⁵¹See P.Ex. 49 at 3.

⁵²*Id.* at 9.

⁵³*Id.* at 7.

⁵⁴See P.Ex. 44 at 150, 45 at 40, 46 at 87, and 48 at 21.

⁵⁵See P.Ex. 1(M), 3(J), 7(B), 9(A).

⁵⁶See P.Ex. 5(A).

Stewart was ultimately committed to a juvenile institution.⁵⁷

Since appellees Brady and Epps had been parties in the state court litigation,⁵⁸ the exceptions in their cases had been dismissed immediately after the juvenile court judge rendered his opinion in *Matter of Anderson*.⁵⁹ Following the decisions of the state appellate courts which reversed the trial court's decision, Brady and Epps immediately filed the instant action. During its pendency in the district court, the exceptions were not pressed.⁶⁰ Because appellees prevailed below, hearings before the juvenile court judge

⁵⁷See P.Ex. 8(D). When Stewart appeared before the juvenile court judge on the exception hearing on June 20, 1974, the judge ordered that he be evaluated at a diagnostic institution and consequently postponed his ultimate decision until the child's evaluation was completed. See P.Ex. 47 at 27-28. When the report was completed on July 30, 1974, the hearing resumed, not before the judge but before Master Bernard M. McDermott who recommended that he be committed to a forestry camp. See P.Ex. 8(D). Why Stewart's exception hearing resumed before a master instead of before a judge is not clear, although the fact that the order of commitment was signed by a judge other than the one who regularly sat in the juvenile court (see P.Ex. 8(D) and T.I. 91-92) suggests that the regular judge may have been on vacation. The fact that the exception hearing was presided over by one master who, substituting for a judge, in effect, overruled the earlier decision of another master, is some evidence of the extent to which the difference between master and judge becomes blurred in practice. See the discussion *infra*, at 68-70.

⁵⁸See *supra*, at fn.15.

⁵⁹See P.Ex. 2(B), 4(E). The State's exceptions in *Brady* and *Epps* (see P.Ex. 2(E), 4(I)) had been filed while the *Anderson* case was pending before the juvenile court judge.

⁶⁰See *supra*, at fn.10.

never occurred. For the same reason, the second hearing of appellee Love never took place.⁶¹

2. The Baltimore City Juvenile Court, Its Personnel, and Its Operation

While the statute and rule in issue are unconstitutional when examined in conjunction with other provisions of the juvenile code and rules, their illegality is confirmed by viewing them in the context of the day-to-day operation of the juvenile court. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886).⁶² In order to give the courts that would pass on the issues in this case full opportunity to understand how the juvenile court really operates, appellees developed an extensive record of testimonial and documentary evidence at the 1975 and 1976 hearings.⁶³ In particular, evidence was adduced to reveal the juvenile court master's true role and his relationship to the juvenile court judge in a large urban court system in which masters are responsible for processing the major portion of the juvenile delinquency

⁶¹In its opinion, the court below permitted the intervention of Eugene Fields. See 436 F. Supp. at 1362. Fields filed a motion for leave to intervene on May 21, 1976 (A.5), alleging in his complaint that at an adjudicatory hearing before a master, he was found not guilty. Thereafter the state's attorney filed exceptions to the findings and requested a hearing before the juvenile court judge. See intervenor's complaint at 2, which appears at pleading no. 38 in Vol. II of the original record in this Court.

⁶²Moreover, an examination of the contested statute and rule as applied will demonstrate that the unconstitutional provisions cannot be saved by permissible judicial interpretation. See generally *Driscoll v. Edison Light & P. Co.*, 307 U.S. 104, 114-15 (1939). Additionally, an examination of actual practice reveals that possible facial unconstitutionality does not dissolve when the provision in question is applied. See generally *United States v. Raines*, 362 U.S. 17 (1960).

⁶³See T.I. 4-5. At the 1975 hearings, appellees presented the testimony of the Baltimore City juvenile court judge (T.I. 91-146), a

(continued)

case load.⁶⁴ Since appellees discuss in the argument⁶⁵ relevant aspects of the juvenile court's operation as revealed by the evidence, only the basic framework will be discussed here.⁶⁶

(footnote continued from preceding page)

Montgomery County juvenile court judge (T.I. 146-161), two Baltimore City juvenile court masters (T.I. 3-16, 225-67, 272-84), the Baltimore City juvenile court clerk (T.I. 16-89, 164-225, 363-68), the Chief of Research for the State Juvenile Services Administration (T.I. 400-13), a law student who had assembled statistical materials (T.I. 285-330), and the mothers of two of the appellees (T.I. 330-51). In addition, appellees introduced 49 exhibits (P.Ex. 1-35, 37-50 (there was no P.Ex. 36)). At the 1976 hearing appellees presented further testimony of the juvenile court clerk (T.II. 2-46). They also prepared, and appellants stipulated to, written testimony of all of the present juvenile court masters (A. 42-44, 50-55), the Chief of the Juvenile Division, Office of the State's Attorney for Baltimore City (A.5 and Vol. II of the original record in this Court at pleading no. 34) and the Chief of Research for the State Juvenile Services Administration (see A.5 and Vol. II of the original record in this Court at pleading no. 37). Finally, appellees introduced 26 additional exhibits (P.Ex. 51-76).

⁶⁴See Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L. J. 3 (1967).

⁶⁵See *infra*, at 68-76.

⁶⁶In their Brief at 8-10, appellants set forth under the sub-heading "Facts" a brief discussion of the make-up of the juvenile court judge's case load, certain procedures that occur at hearings before the master, and the mechanism for taking exceptions to a master's findings. Although the statement is essentially accurate as far as it goes, it reveals little relevant information beyond that which can be gleaned from a cursory examination of the juvenile statute and rules. Appellants ignore the great bulk of virtually uncontested testimony and documentary evidence, which "puts flesh on the bare bones of the statute and rules," *Aldridge v. Dean*, 395 F. Supp. at 1168, and thereby makes more understandable the underlying constitutional issues. In addition to the facts and discussion in this Brief, see *Aldridge v. Dean* which makes 28 findings of fact (395 F. Supp. at 1163-66, 1169-71), all of which are based on and supported by the evidence which is part of the original record in the instant case. See *supra*, at fn.21.

a. The Juvenile Court's Personnel and Their Duties

The juvenile court is composed of one judge and seven full time masters (T.I. 21-23; T.II.4).⁶⁷ They are assigned to hear delinquency and non-delinquency cases⁶⁸ (T.I. 228). In delinquency cases, the judge and masters preside at a variety of hearings which include the initial arraignment hearing (T.I. 51), the detention hearing (T.I. 54-57),⁶⁹ the adjudicatory hearing (T.I. 66)⁷⁰ and the disposition hearing (T.I. 69-76).⁷¹ Either the judge or the masters may conduct any one of these hearings (T.I. 21, 101-02, 228). In addition, the judge presides at all hearings in which the State requests a waiver of jurisdiction to the criminal court.⁷² In addition to hearing cases that are set in before

⁶⁷In addition to Baltimore City, the following counties in Maryland employ masters in their juvenile courts: Wicomico, Baltimore, Harford, Anne Arundel, Carroll, Howard, Prince George's, Charles, St. Mary's. See JUVENILE SERVICES ADMINISTRATION, MD. DEPT OF HEALTH & MENTAL HYGIENE, DIRECTORY (1977) at 5, 9, 10, 13, 15, 16, 20, 23.

⁶⁸The juvenile causes statute also gives the juvenile court jurisdiction over children in need of supervision and children in need of assistance. See § 3-804(a). Those two categories are defined in §§ 3-801(f) and 3-801(e), respectively.

⁶⁹See § 3-815(c); Rule 912.

⁷⁰See *supra*, at fn.16.

⁷¹See *supra*, at fn.43.

⁷²See § 3-817; Rule 913. Prior to September, 1975, waiver hearings were set in before the masters as well as the judge (T.I. 63). Commencing approximately September 17, 1975, the juvenile court judge instructed the clerk to schedule all waiver cases before him (T.II. 10). Since January 1, 1977, court rule requires that all waiver cases be heard by the judge. See Rule 911.a.2.

him originally and those that are set in by way of exception (T.I. 101), the judge is responsible for the day-to-day administration of the juvenile court (T.I. 94-94B, 136-38).

b. The Assignment of Cases

Cases are assigned to the judge and masters by the juvenile court clerk. Rule 904.b. Neither the prosecution nor the defense plays any role in such assignments (T.I. 87; T.II. 13).⁷³ While the number and kind of delinquency cases scheduled before the judge for trial have varied,⁷⁴ the judge has customarily been assigned cases in which it is anticipated that an exception would be taken regardless of the outcome (T.I. 87, 102), and which involve more serious offenses such as armed robbery (A.45; T.I. 101-03). However, due to the volume of cases involving serious acts of violence, such cases are spread fairly equally among the masters and the judge (T.I. 103).

c. The Size and Distribution of Case Loads

Collectively, the judge and seven masters of the juvenile court hear many thousands of cases each year. In calendar year 1974, over twelve thousand hearings were held in delinquency cases.⁷⁵ The figures for calendar year

⁷³The statutes of several states and provisions of certain model juvenile court acts provide that if a master can be assigned to preside at an adjudicatory hearing, the juvenile has the option of deciding whether or not his case will be tried before him or before the judge. Other states, like Maryland, do not give the child that right or choice. See the *Amicus Curiae* Brief filed by the National Juvenile Law Center, at 20-22.

⁷⁴Compare T.I. 87 with T.II. 13.

⁷⁵See P.Ex. 39, 40 at A.29, 32; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 14).

1975 showed comparable case loads.⁷⁶ The vast majority of those hearings was held before the seven masters. The statistics for calendar year 1974 show that masters presided at 11,253 delinquency hearings and the judge presided at 778.⁷⁷ Isolating out only adjudicatory hearings from that total, the masters presided at 5,345 hearings and the judge at 327.⁷⁸

d. The Adjudicatory Hearing

There is essentially no difference in an adjudicatory hearing conducted before a master and such a hearing conducted before a judge.⁷⁹ Further, the description of the adjudicatory hearing given by one of the juvenile court

⁷⁶See P.Ex. 71, 73, 74.

⁷⁷See P.Ex. 39, 40.

⁷⁸*Id.* The data compiled for calendar year 1974 was prepared through time consuming hand counting procedures by appellees' counsel in order to reveal the full scope of the master's involvement in the trial of delinquency cases. The method by which this data was accumulated is explained at T.I. 288-90. Since the data compiled for calendar year 1975 was obtained from existing materials, it does not include a breakdown of case load between master and judge. Since the number of masters in the juvenile court has remained the same, the breakdown of case load between master and judge would be roughly the same for the 1975 calendar year covered by P.Ex. 71, 73, and 74.

⁷⁹See *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 17). The only difference noted by the *Aldridge* court was that the proceedings before the judge were recorded by a court reporter. *Id.* Effective July 1, 1975, the juvenile code was amended to require masters' proceedings to be recorded. See §3-813(b). A tape recorder is used for this purpose (A.44, 55).

masters⁸⁰ reveals that it is little different from a criminal trial:

The delinquency cases, the order in which they're called is determined by the State's Attorney. He would indicate what cases he is calling and my Bailiff would take the folder containing the Clerk's file from the stack of other folders which may be, have been referred to me, on that day. He would have previously given to me one copy of that Petition, which we usually call the note copy of the Petition, to inform me of what the charge is. He would read the Petition. The State would present its case. The witnesses would be called. They would be individually sworn. They would be subjected to direct testimony and then cross-examination. At the conclusion of the State's case, the defense, normally, makes a motion to dismiss. If it's denied, the defense would then present its case by presenting witnesses and have them sworn, individually, and at the conclusion of the defense's case, we would hear argument and after argument, reach a decision about whether the charge was or was not sustained.

Then, I would, in reaching the conclusion, announce my finding to the persons who are there at that time, explaining the reasons why I reached the conclusions that I did and, usually, referring back to the evidence which I heard and relating it to the elements of the offense and, I usually terminate the adjudicatory Hearing by announcing that I find the delinquent act to be sustained. (A.11-12).

⁸⁰Another juvenile court master who read that description testified to its accuracy. He further stated that, based on his observations of how all of the other masters conducted their hearings when he appeared before them as a public defender, the description accurately portrayed the manner in which the other masters conducted their hearings (A. 52-53). See *Breed v. Jones*, 421 U.S. 519, 529 n.11 (1975).

During the course of the adjudicatory hearing, the master observes the demeanor of the witnesses and utilizes those observations in assessing credibility (A.12; T.I. 273). The rules of evidence utilized in adult criminal proceedings are applied and the master makes rulings on evidentiary objections (A.13). In making findings on the issue of innocence or guilt, the standard of guilt beyond a reasonable doubt is applied (A.13).⁸¹ At the conclusion of the adjudicatory hearing, the master announces his findings. Rather than use words such as "delinquent act sustained," more familiar words are chosen such as

I find you did commit the act you are charged with. If this were an adult court, I would announce, you're guilty of the charge, I find you guilty. (A.13).⁸²

e. The Judge's Review of the Master's Findings

In the relatively few cases which the judge hears on exception,⁸³ the parties present new evidence or, if the exception hearing is on the record, evidence that was presented to the master.⁸⁴ However, in the vast bulk of cases—those in which no exceptions are taken—the masters' findings and recommendations are ruled on by the

⁸¹See §3-819(b); *In re Winship*, 397 U.S. 358 (1970).

⁸²The manner in which the parent and child perceive the master at the hearing and their reactions to the master's findings are discussed *infra*, at 68-70.

⁸³In calendar year 1974, the judge held 219 hearings as a result of exceptions taken by a party. See P.Ex. 40 at A.32. In that same year masters held 11,253 hearings. See P.Ex. 39 at A.29.

⁸⁴But see the discussion *infra*, at 87 and fn. 172.

judge *ex parte* and *in camera* (T.I. 105, 119, 150).⁸⁵ In passing on the recommendations of a master, the judge has before him essentially no information describing the evidence that was developed at the trial before the master.⁸⁶ His capacity to review the proposed orders that he receives from the masters is further complicated by the high volume of orders he signs each year. For calendar year 1974, the judge signed 9,842 orders in delinquency cases.⁸⁷ This lack of information, combined with the high volume of proposed orders, results in perfunctory review by the judge and virtually automatic approval of the masters' recommendations.⁸⁸

f. Actions Taken by Masters in Which the Custody of the Child is Affected Either Prior to or in Total Absence of Review by the Judge

In many instances, actions taken by the masters which affect the child's custody are implemented prior to review by the judge or are never reviewed at all. If, at the conclusion of a detention hearing, the master decides to

⁸⁵See *Matter of Brown*, 13 Md. App. 625, 633, 284 A.2d 441, 445 (1971), where the court referred to the judge's review of masters' findings and recommendations as being "frequently conducted *ex parte* and frequently conducted *in camera*..."

⁸⁶The overwhelming evidence in the record that supports these conclusions is analyzed *infra*, at 72-76. See *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 23).

⁸⁷See P.Ex. 41, set forth at A.33; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 15). This total does not include orders the judge signed in connection with children who are involved in the 1,481 non-delinquency hearings. See P.Ex. 43.

⁸⁸See *infra*, at 76-78; *Aldridge v. Dean*, 395 F. Supp. at 1171 (Findings 24 and 25).

release the child pending further hearing, that decision is not reviewed by the judge (T.I.59).⁸⁹ Similarly, if the master, at the conclusion of an adjudicatory hearing, finds that the child committed the act alleged but postpones the disposition hearing until a later date,⁹⁰ his decision to release the child pending the disposition hearing is not reviewed by the judge (A.19-20; T.I.199, 281).⁹¹ If a child has been detained pending an adjudicatory hearing and the master finds at the conclusion of the hearing that the charge is not sustained, the child is normally released immediately without waiting for the judge to sign an order ratifying the finding (A. 18-19; T.I.278).⁹²

In two instances, the master is given explicit power to enter an order. Pursuant to Rule 911.a.1, he is authorized to order detention or shelter care.⁹³ He is also authorized by statute to order the detention of a child between the time that he enters his findings at the conclusion of the

⁸⁹In calendar year 1974, 652 such decisions, all unreviewed by the judge, were made. See P.Ex. 42 at A.34.

⁹⁰The child has the right to a minimum of five days notice for each hearing except a detention hearing. See Rule 910.c. Moreover, the master may wish to postpone the disposition hearing pending a medical evaluation or other investigation (T.I. 72, 235).

⁹¹See *Aldridge v. Dean*, 395 F. Supp. 1161, 1171 (D.Md. 1975) (Finding 27). In calendar year 1974, masters took actions of this type 1,122 times. See P.Ex. 42 at A.34.

⁹²See *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 27). The only exceptions would be where the child is being held on another charge or the State immediately excepts to the master's findings (T.I. 247-48).

⁹³This rule was adopted by the Court of Appeals of Maryland one year after it rendered its decision in *Matter of Anderson*. See 2 Md. Reg. 967, 970 (1975). At the time of its adoption in 1975, the rule was designated Rule 910.a. See *supra*, at fn.8.

adjudicatory hearing and the time the judge signs the final order in the case. §3-813(d). The statute, which was enacted in 1977,⁹⁴ merely ratified existing practice (A.18; T.I.277).⁹⁵

SUMMARY OF ARGUMENT

I. This Court has generously applied the protections of the double jeopardy clause of the Fifth Amendment of the United States Constitution to adult criminal proceedings. The clause clearly protects against the reprosecution of a criminal defendant on a charge for which he has either been convicted or acquitted. Its major focus is upon the risk, rather than the actuality of conviction, but it also precludes the imposition of a second punishment for a crime for which the defendant has already been punished. Juveniles accused of committing crimes have, since 1975, also been accorded the protections of the double jeopardy clause, and,

⁹⁴1977 Md. Laws, Ch. 259.

⁹⁵See *Aldridge v. Dean*, 395 F. Supp. 1161, 1171 (D.Md. 1975) (Finding 26). Since the judge may not sign the order ratifying the master's decision until the time allowed for a party to take an exception has run, see *In re Appeal No. 287*, 23 Md. App. 718, 329 A.2d 420 (1974), up to 15 days may go by before the order is signed. See Rule 911.b and c, which provide, respectively, that the master shall transmit his findings and recommendations to the judge within 10 days following the conclusion of the disposition hearing, and that a party has 5 days thereafter to except. Since the parties virtually always waive the master's written findings and recommendations (A.44, 53; T.II. 18-19), the normal time period which would be required to elapse before the judge signs the order would be 5 days. See P.Ex. 63 and the discussion *infra*, at 74-75.

therefore, cannot be subjected to the risk of multiple prosecutions and multiple punishments. *Breed v. Jones*, 421 U.S. 519 (1975).

II. Initial jeopardy attaches at an adjudicatory hearing before a master for two reasons. First, the proceeding is one in which the juvenile is subjected to the risk of being found guilty and punished. Second, the master is the trier of fact and, as such, hears evidence relevant to the question of a youth's guilt or innocence. Whatever his title, the role that the master actually plays clearly demonstrates that the adjudicatory hearing at which he presides is, in fact, the youth's trial. Hence, jeopardy must attach in that proceeding at the same point that it would in an adult criminal proceeding tried to a judge—when the court begins to hear evidence. These conclusions are supported by this Court's decision in *Breed v. Jones* in which a master presided over the adjudicatory hearing at which an initial jeopardy was held to attach.

III. A hearing before a juvenile court judge, either *de novo* or on the record, that occurs after a master has already determined the guilt or innocence of the child, places that child in jeopardy for a second time. That the master is not empowered to enter a final order is immaterial for purposes of invoking the protections of the double jeopardy clause. The master, for all practical purposes, resolves the issue of the child's innocence or guilt after listening to testimony, weighing the credibility of witnesses, and evaluating all evidence presented. The hearing, consequently, is procedurally very similar to an adult criminal trial. Indeed, it subjects the child and his family to the same personal strain, public embarrassment, and expense that an adult defendant

suffers in a criminal trial—the same pressures that, under the double jeopardy clause, ordinarily must be endured only once. *Abney v. United States*, 431 U.S. 651, 661 (1977). Additionally, review by the juvenile court judge is perfunctory because of the enormous case loads of the masters, the time consuming nature of the judge's other duties, and the scanty nature of the material the judge has before him when he is presented proposed orders for signature. Therefore, in nearly all cases, the judge accepts the master's recommendation without question. Further, a court order formalizing a finding of innocence or guilt is not necessary to confer the finality required to terminate initial jeopardy. *United States v. Ball*, 163 U.S. 662 (1896).

Even if a master's findings are not considered sufficiently final to terminate initial jeopardy, a second hearing before the judge is improper under the test first advanced by this Court in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). When the State takes an exception to a master's finding, it causes the normal process to be aborted prior to a final termination of the proceedings. The record illustrates that, but for the filing of the exception, the judge would have signed the master's recommendations.

IV. Even if the second hearing before the juvenile court judge is held on the record rather than *de novo*, it nevertheless violates the double jeopardy clause. The judge, who has only a tape recording or transcript before him, has different evidence to consider than did the master because he is not in the same position to evaluate the credibility of witnesses. However, even if the evidence before him is viewed as being identical to the evidence before the master, double jeopardy principles are offended because the

prosecutor is receiving another chance before a second factfinder to obtain a guilty verdict after having failed to do so before the first.

V. The facts and circumstances of the instant case demonstrate that a child is placed in jeopardy for a second time if the State excepts to the master's finding and he is subjected to a hearing either *de novo* or on the record. The facts of this case, unlike the facts in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), present no countervailing interest which overcome the right of the child not to be placed twice in jeopardy for the same offense.

ARGUMENT

I. THE DOUBLE JEOPARDY PROTECTIONS EMBODIED IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAVE BEEN LIBERALLY APPLIED BY THIS COURT TO BOTH CRIMINAL AND JUVENILE DELINQUENCY PROCEEDINGS

Before analyzing whether double jeopardy protections should be applied to prohibit second hearings as authorized by the statute and rule in dispute, it is helpful to delineate the present reaches of the double jeopardy protection. It is apparent that, whatever its precise meaning at common law, the double jeopardy concept has been extended by this Court to cover a broad range of interests relating to the right of a criminal defendant to be free from multiple trials and punishments for the same offense. Likewise, the Court has already accepted the basic notion that persons should not be denied these benefits simply because they are children.

A. The Development of Double Jeopardy Rights for the Criminal Defendant

As this Court has frequently noted, the concept of double jeopardy is deeply rooted in our history and can be traced back at least as far as the Greek and Roman empires. See *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting); *United States v. Wilson*, 420 U.S. 332, 339-42 (1975). See also J. SIGLER, DOUBLE JEOPARDY, 1-37 (1969). Since *Benton v. Maryland*, 395 U.S. 784 (1969), these protections apply with full force to the states.⁹⁶ In an often quoted statement in *Green v. United States*, 355 U.S. 184, 187-88 (1957), this Court articulated the central objective of the double jeopardy clause:

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being

⁹⁶At least with respect to the central purpose of a constitutional rule, this Court has in recent years consistently refused to apply to the states through the due process clause of the Fourteenth Amendment, "watered-down" versions of the Bill of Rights. See *Benton v. Maryland*, 395 U.S. at 794-95. The instant case does not involve some aspect of a constitutional protection which might be deemed incidental to the purpose of the constitutional rule and, hence, not applicable to the states. See, e.g., *Williams v. Florida*, 399 U.S. 78 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Although there may be some aspects of double jeopardy law which might be carved out and designated as sufficiently tangential to the central purpose of the double jeopardy clause so as not to require application of the protection to the states, see, e.g., *Bretz v. Crist*, 546 F.2d 1336 (9th Cir. 1976), *juris. post. sub nom.*, *Crist v. Cline*, No. 76-1200, 430 U.S. 982 (1977), the instant case plainly does not involve interests which can be so categorized. See discussion in Brief on Reargument for the United States as *Amicus Curiae*, *Crist v. Cline*, No. 76-1200, (Oct. Term, 1977) at 2-3.

subjected to the hazards of trial and possible conviction more than once for an alleged offense.

* * *

This underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See also *Benton v. Maryland*, 395 U.S. at 795-96; *Serfass v. United States*, 420 U.S. 377, 387-88 (1975).

Although at common law the double jeopardy protection was designed to protect a defendant from a new prosecution after final acquittal or conviction,⁹⁷ the protection, as it has developed in this country, is much broader in scope than either its English roots or the current practice in England.⁹⁸ In *United States v. Jorn*, 400 U.S. 470 (1971) this Court noted:

A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections

⁹⁷A careful examination of the development of double jeopardy principles in English law and the transfer of those concepts into the federal and state constitutions of this country is set forth in the Brief on Reargument for the United States as *Amicus Curiae*, *Crist v. Cline*, No. 76-1200 (Oct. Term, 1977) at 9-19.

⁹⁸See 11 Halsbury's Laws of England, §242 (4th ed. 1976).

which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. 400 U.S. at 479 (plurality opinion).

In considering those circumstances in which the Government would be permitted to prosecute a second time for the same offense when the first trial ended before the verdict was reached, the Court gave recognition to "a defendant's valued right to have his trial completed by a particular tribunal. . . ." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). See also *Lee v. United States*, 432 U.S. 23, 34 (1977) (Brennan, J., concurring); *Arizona v. Washington*, - U.S. -, 46 U.S.L.W. 4127 (Feb. 21, 1978).

Obviously a person who has not yet been acquitted or convicted runs no risk of being acquitted or convicted a second time when he is tried again for the same offense. Nevertheless, the risk of conviction remains present at each prosecution, and it is that risk and all the detriments attendant to it, that this Court has insisted on minimizing in its evolving interpretation of the meaning of double jeopardy protections. This point was made in one of its most recent double jeopardy decisions:

Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. *Abney v. United States*, 431 U.S. 651, 661 (1977).

See also *Price v. Georgia*, 398 U.S. 323, 331 (1970).⁹⁹ In *Abney*, this Court concluded that a pre-trial order denying a motion to dismiss an indictment on double jeopardy grounds fell within the "collateral order" exception to the final judgment rule set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In reaching this conclusion, the Court stressed that double jeopardy rights "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence," 431 U.S. at 660, since the double jeopardy clause is designed to protect against undergoing unnecessary trials as well as punishment.

In sum, the double jeopardy clause protects the accused's verdict of acquittal from subsequent attack. It guards against an accused being convicted or punished a second time for the same offense. Finally, it insures that, absent special circumstances, the defendant will not have to endure more than one trial with its embarrassment, expense, and other hardships.

So vigorously has this Court enforced double jeopardy protections against multiple trials that exceptions "have been only grudgingly allowed." *United States v. Wilson*,

⁹⁹In *Price*, the State of Georgia contended, *inter alia*, that since Price suffered no greater punishment on a second conviction for the same offense than he did on the first, any second jeopardy was harmless error under *Chapman v. California*, 386 U.S. 18 (1967). Rejecting that contention, this Court stated:

The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. 398 U.S. at 331 (footnote omitted).

420 U.S. at 343. Where the defendant himself appeals a conviction and is successful in having it reversed, it has been accepted since *United States v. Ball*, 163 U.S. 662 (1896) that he may be tried again without offending the double jeopardy clause.¹⁰⁰ The defendant may also be subjected to a second trial where the first one is ended prematurely if the reason for the aborted trial can be justified by "manifest necessity" and the failure to re-prosecute would "defeat the ends of public justice. . . ." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).¹⁰¹

¹⁰⁰This exception to the double jeopardy rule has normally been explained either on the theory that, by appealing his conviction, the defendant waived his plea of former jeopardy, or on the theory that the act of appeal simply continued the first jeopardy. See *Green v. United States*, 355 U.S. at 189; *Price v. Georgia*, 398 U.S. at 329. Both theories pose certain difficulties. "Continuing jeopardy" becomes confused with the very different and more expansive "continuing jeopardy" concept that was postulated by Mr. Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195 U.S. 100, 134 (1904) in an attempt to justify Government appeals from acquittals. The Holmes "continuing jeopardy" concept, however, has never been adopted by a majority of the Court. See *United States v. Jenkins*, 420 U.S. 358, 369 (1975); *Breed v. Jones*, 421 U.S. 519, 534 (1975). The waiver theory, likewise, becomes confused with the more traditional waiver notions set forth in *Johnson v. Zerbst*, 304 U.S. 458 (1938), although in this double jeopardy context "waiver" tends to have a somewhat different meaning. See *United States v. Jorn*, 400 U.S. at 484 n.11 (1971) (plurality opinion); *United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976). More recently, this Court eschewed both approaches, pointing out that an analysis of the competing interests of the defendant and society better explains the reason for the exception than do conceptual abstractions. See *United States v. Tateo*, 377 U.S. 463, 466 (1964); *Breed v. Jones*, 421 U.S. 519, 534 (1975).

¹⁰¹The "manifest necessity" exception has been the subject of much litigation since *Perez*. See, e.g., *Simmons v. United States*, 142 U.S. 148 (1891); *Logan v. United States*, 144 U.S. 263 (1892); *Wade v. Hunter*, 336 U.S. 684 (1949); *Downum v. United States*, 372 U.S. 734 (1963); *Gori v. United States*, 367 U.S. 364 (1961); *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Somerville*, 410 U.S. 458 (1973).

Likewise, the defendant may be tried again when he, himself, requests a mistrial, provided that the need for making such a request is neither prosecutorial nor judicial over-reaching.¹⁰² As appellees will establish, *infra*, none of these three exceptions justifies their retrial for the same offense.¹⁰³

B. The Development of Double Jeopardy Rights for the Juvenile

Since 1966, this Court, in a series of cases, has explored the extent to which juveniles charged with criminal acts in a juvenile court¹⁰⁴ may invoke provisions of the Bill of Rights in the same manner as if they had been prosecuted

¹⁰²See *United States v. Dinitz*, 424 U.S. 600 (1976); *Lee v. United States*, 432 U.S. 23 (1977).

¹⁰³Another exception to normal double jeopardy principles, the "dual sovereignty" doctrine, would allow a second trial under the theory that since a separate sovereignty is prosecuting the defendant, the "second trial is really a trial for a completely separate offense. *Bartkus v. Illinois*, 359 U.S. 121 (1959). *Bartkus* was rendered in an era when double jeopardy concepts had not yet been held to apply with full force to the states. Since *Waller v. Florida*, 397 U.S. 387 (1970), the doctrine has not been available to justify two prosecutions for the same act, if each stems from a different arm of government within the territory of a single state. Although much of *Bartkus*' force appears to have been dissipated by subsequent double jeopardy rulings of this Court, recent efforts to obtain reconsideration of the dual sovereignty issue have been unsuccessful. See *Turley v. Wyrick*, 554 F.2d 840 (8th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (Jan. 16, 1978).

¹⁰⁴Typically, as in Maryland, juvenile courts use words other than "crime" in describing the act that the child is charged with committing. Whatever the terminology, appellees direct themselves to those offenses which, if committed by an adult and prosecuted in criminal courts, would constitute violations of penal laws.

as adults in the criminal courts. See *Kent v. United States*, 383 U.S. 541 (1966);¹⁰⁵ *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Without canvassing these cases in detail,¹⁰⁶ it is sufficient to note that they represent a major shift from the *parens patriae* philosophy that fostered the juvenile court system and an effort to bring realism into thinking about the juvenile justice system. While the Court has been unwilling to declare the juvenile court experiment a total failure, see *McKeiver v. Pennsylvania*, 403 U.S. at 551 (plurality opinion),¹⁰⁷ it has also been unwilling to invoke "the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings" as a means of avoiding a realistic assessment of the effect that a juvenile delinquency proceeding has on the children involved. *In re Gault*, 387 U.S. at 50.

Three terms ago, this Court made its most recent pronouncement concerning application of constitutional rights to juveniles charged with crime. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court ruled that it was "simply too late in the day to conclude . . . that a juvenile is not put in jeopardy" when he is tried in a juvenile court for committing an act that violates a criminal law. 421 U.S. at

¹⁰⁵Although *Kent* involved a construction of the District of Columbia's juvenile code, its constitutional underpinnings have been firmly established since the Court decided *In re Gault*, 387 U.S. 1, 12-13 (1967).

¹⁰⁶The particular significance to this case of *In re Winship* is discussed *infra*, at 86.

¹⁰⁷The emergence of the juvenile court system in this country is traced in Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). See also *In re Gault*, 387 U.S. at 14-19.

529. In concluding that juveniles enjoy the double jeopardy protections of the Fifth Amendment, this Court explicitly emphasized the admonishment in *Gault* that the juvenile delinquency process be recognized for what it really is—not what label is put on it. 421 U.S. at 529. Although the holding of *Breed* is concerned with only one of a number of possible situations in which a juvenile may be subjected to a second jeopardy,¹⁰⁸ it is clear that the thrust of *Breed* is to extend the full protections of the double jeopardy clause to persons who are forced to appear before two fact-finders for the same criminal offense, whatever the combinations may be in terms of adult or juvenile court appearances.¹⁰⁹ Indeed, appellees will demonstrate that the narrow holding of *Breed* completely disposes of appellants' central

¹⁰⁸In *Breed*, the first jeopardy attached to the prosecution in the juvenile court and the second to the prosecution in the adult criminal court. Another obvious double jeopardy violation would arise with successive prosecutions within the juvenile court for the same offense. See, e.g., *M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971). Although unlikely, it would be possible theoretically for jeopardy to attach first when the juvenile is prosecuted in criminal court and then subsequently attach in a juvenile court proceeding commenced as a result of a "reverse" waiver of jurisdiction. See, e.g., Ann. Code Md., Art. 27, §594A (1976 and 1977 Cum. Supp.). Within these basic combinations are numerous permutations involving such questions as what was the precise nature of the hearing at which it is claimed that jeopardy attached, see, e.g., *In re Hurlic*, 20 Cal. 3d 317, 572 P.2d 57, 142 Cal. Rptr. 443 (1977), or what was the authority or power of the judicial officer who presided at the hearing where it is alleged that jeopardy attached. See, e.g., the instant case.

¹⁰⁹Appellees, of course, recognize that the traditional exceptions to the double jeopardy protection discussed *supra*, at 37-39, continue unabated after *Breed*. None of them, however, has any application to the instant case. See *infra*, at 80-86.

argument.¹¹⁰ While appellants' alternative argument¹¹¹ may perhaps survive *Breed's* narrow holding, it surely does not survive the thrust of its reasoning.

II. INITIAL JEOPARDY ATTACHES WHEN THE JUVENILE COURT MASTER BEGINS TO TAKE EVIDENCE AT AN ADJUDICATORY HEARING

It is axiomatic that a person must be placed in jeopardy once before he can be placed in jeopardy a second time in violation of constitutional double jeopardy protections. *Serfass v. United States*, 420 U.S. 377, 392 (1975). Appellants' central contention is that jeopardy never attaches at a hearing before a master, but instead attaches for the first time only when, at the request of the child or the state, the juvenile court judge commences to hear evidence at a *de novo* or an on the record hearing.¹¹² An examination of the law relating to the type of proceeding at which jeopardy attaches and the point in that proceeding at which it attaches reveals that appellants' position is unsupported by the cases that deal generally with double jeopardy and is at total odds with this Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975).

¹¹⁰See Brief of Appellants at 13-23.

¹¹¹See Brief of Appellants at 23-30.

¹¹²See Brief of Appellants at 13-23. Appellees discuss *infra*, at 86-92 whether it is constitutionally significant if the second hearing before the judge is *de novo* instead of on the record.

A. The Adjudicatory Hearing Before the Master Is the Type of Proceeding to Which Jeopardy Attaches

The threshold question is whether the adjudicatory hearing before the master is the type of proceeding to which jeopardy attaches. Pointing out that jeopardy "denotes risk", the Court in *Breed v. Jones* analyzed "an aspect of the juvenile court system in terms of the kind of risk to which jeopardy refers." 421 U.S. at 528, 531. Using this analysis, the Court concluded that, for purposes of the attachment of jeopardy, "there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." 421 U.S. at 530. The *Breed* Court recognized that in juvenile delinquency proceedings it is the adjudicatory hearing when the respondent is "put to trial before the trier of the facts," 421 U.S. at 531. See also *United States v. Jorn*, 400 U.S. 470, 479 (1971); *Serfass v. United States*, 420 U.S. 377, 389 (1975). The adjudicatory hearing in the Baltimore City juvenile court, like the one in *Breed*, is the stage at which the trier of facts hears evidence on the issue of innocence or guilt. *Matter of Brown*, 13 Md. App. 625, 632, 284 A.2d 441, 444-45 (1971). See also A. 11-14, 52.

That the fact-finders at appellees' trials were masters rather than judges¹¹³ does not change the fact that jeopardy initially attaches at the adjudicatory hearing. Indeed, *Breed* settles this issue since the presiding officer at the juvenile

¹¹³Naturally, the judge, himself, is a fact-finder in those cases which are set before him either initially or by way of exception (T.I. 87, 101-03).

court adjudicatory hearing in that case—at which jeopardy was held to attach—was a *master*,¹¹⁴ not a judge. See Appendix, *Breed v. Jones*, at 8-9, 17-19. Wholly aside from *Breed*, one must be blind to reality not to recognize that the judicial officer presiding at the adjudicatory hearing is serving as the fact-finder on the issue of innocence or guilt. As the California Court of Appeal recently noted in upholding the right of a juvenile court master to be a fact-finder: "The human being and not the title finds the facts." *In re Jay J.*, 66 Cal. App. 3d 631, 634, 136 Cal. Rptr. 125, 127 (1977). See also *Holiday v. Johnston*, 313 U.S. 342, 352-54 (1941); *Wingo v. Wedding*, 418 U.S. 461, 474 (1974).

B. Initial Jeopardy Attaches at That Point in the Adjudicatory Hearing When the Master, Sitting as Fact-Finder, Begins to Receive Evidence

Once it is established that a master's adjudicatory hearing is that type of proceeding at which constitutional jeopardy concepts become implicated, all that remains to be decided is the point in the hearing at which initial jeopardy

¹¹⁴In California, the term "referee" is used to designate the subordinate judicial officer who, in Maryland, is known as a master. See Cal. Welf. & Inst. Code, §247 (West 1977 Supp.). To avoid unnecessary confusion in terms, the term "master" will be used when referring to the juvenile court referee in California. As explained *infra*, at fn.129, the role of the referee in the California juvenile court and the role of the master in the Maryland juvenile court are strikingly similar; those differences that do exist do not bear on the legal issues presented in the instant case. See Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3 (1967).

first attaches. Upon that decision hinges the answer to the ultimate question—whether a violation of double jeopardy principles occurred in the circumstances of a particular case. See *Serfass v. United States*, 420 U.S. 377, 388 (1975).

Although the common law rule was more restrictive,¹¹⁵ this Court has, over the years, pushed back in time the point at which jeopardy attaches.¹¹⁶ Presently a defendant is placed in jeopardy when he is put to trial before the trier of facts. *United States v. Jorn*, 400 U.S. 470, 479 (1971). When the fact-finder is a jury, the point at which the defendant is put to trial has been assumed to be the point at which the jury is sworn. *Downum v. United States*, 372 U.S. 734 (1963); *Illinois v. Somerville*, 410 U.S. 458, 467 (1973); *Serfass v. United States*, 420 U.S. at 388; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). In *Serfass* and *Martin Linen Supply*, this Court established that, at a bench trial, jeopardy attaches when a judge begins to receive evidence. *Accord, Lee v. United States*, 432 U.S. 23, 27 n.3 (1977). Although the point of attachment for jury trials is presently under review in *Crist*

¹¹⁵See the discussion *supra*, at 35.

¹¹⁶The present standard evolved in a series of cases. See, e.g., *Kepner v. United States*, 195 U.S. 100, 128 (1904); *Bassing v. Cady*, 208 U.S. 386, 391-92 (1908); *Collins v. Loisel*, 262 U.S. 426, 429 (1923); *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Green v. United States*, 355 U.S. 184, 188 (1957).

v. Cline, No. 76-1200, *juris. post.*, 430 U.S. 982 (1977),¹¹⁷ this Court has given no indication that the attachment of jeopardy should be any later than the point at which the fact-finder begins to hear evidence.¹¹⁸

In *Breed*, this Court without hesitation ruled that jeopardy attached "when the Juvenile Court, as the trier of the facts, began to hear evidence." 421 U.S. 519, 531 (1975). Indeed, the California appellate court in *Breed* had earlier reached the same conclusion. See *In re J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 189 (1971). *Accord*, *In re S.*, 10 Cal. App. 3d 952, 956, 89 Cal. Rptr. 499, 501-02 (1970); *In re Hurlic*, 20 Cal. 3d 317, 325 n.8, 572 P.2d 57, 61-62 n.8, 142 Cal. Rptr. 443, 447-48 n.8 (1977).

¹¹⁷On December 5, 1977, the Court ordered reargument in *Crist v. Cline*, requesting the parties and the United States to address the following questions:

1. Is the rule heretofore applied in the federal courts—that jeopardy attaches in jury trials when the jury is sworn—constitutionally mandated?
2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or non-jury—until the first witness is sworn? 98 S. Ct. 603, 604.

¹¹⁸In their Brief on Re-argument in *Crist v. Cline*, at 19, appellants contend that jeopardy should not attach until the prosecutor has produced evidence adequate to make out a *prima facie* case of guilt. Even though that standard would be of no help to the appellants in the instant case, appellees share the view expressed in the Brief on Reargument for the United States as *Amicus Curiae*:

The rule in bench trials is that jeopardy attaches when evidence is introduced, and we believe it is untenable today, in light of the history set forth above, to suggest that any later point would be permissible. *Id.* at 19 (footnote omitted).

C. Appellants' Principal Argument—That Appellees' Double Jeopardy Rights Were Not Violated Since They Were Never Placed in Initial Jeopardy Before a Master—Does Not Square with Either *Breed v. Jones* or the Earlier Double Jeopardy Rulings of This Court

Appellants' principal argument—that jeopardy does not attach at the master's adjudicatory hearing—rests on essentially three contentions. First, they argue that *Breed v. Jones*, 421 U.S. 519 (1975) supports their position. Second, they invoke the constitutional and decisional law of Maryland to demonstrate that a juvenile court master plays such a limited role that a hearing he conducts could not be one at which jeopardy attaches. Finally, they contend that jeopardy cannot attach to a master's hearing because the master lacks jurisdiction to try or adjudicate the issue of innocence or guilt.¹¹⁹

1. The Relevance of *Breed v. Jones*

In their Brief at 14, 21, appellants quote from portions of the *Breed* opinion, in each case italicizing written phrases for emphasis. On page 14, the phrase italicized is: "*when the juvenile court, as the trier of facts, began to hear evidence.*" On page 21, the italicized words which

¹¹⁹These three points, which will serve as the focus for an analysis of appellants' position, are not set out specifically in separate subsections of their Brief. However, appellees have organized appellants' discussion that appears at 13-23 of their Brief into these three arguments in order to facilitate a reasoned analysis of the appellants' position.

immediately follow the phrase "an adjudicatory hearing" are: "*such as was held in this case*". When combined with a further quotation from *United States v. Jenkins*, 420 U.S. 358 (1975), where the word "*judge*" is italicized, Brief of Appellants' at 15, it is clear that appellants view *Breed* as establishing an attachment of jeopardy rule that applies only when the adjudicatory hearing is presided at by a judge. As noted earlier,¹²⁰ the very holding in *Breed* necessarily encompasses the adjudicatory hearing presided at by a master since such was the case in *Breed* itself.

Appellants further contend that the use of the phrase "an adjudicatory hearing such as was held in this case" indicates an express intent by this Court to limit the application of double jeopardy principles to the very facts of *Breed*. Brief of Appellants at 21. It is not clear whether appellants' allusion to "the specific facts" refers to the type of judicial officer who presided at the adjudicatory hearing¹²¹ or to the fact that *Breed* involved one hearing in the juvenile court and another hearing in a criminal court.¹²² If the latter is the case, the instant case does differ from *Breed* merely because each hearing in which appellees claim that jeopardy attaches takes place within the juvenile court.

Putting to one side the question of whether a proceeding before a juvenile court master, followed by another before a juvenile court judge, is properly viewed as

¹²⁰See discussion *supra*, at 43-44.

¹²¹If this is appellants' contention, appellants will not prevail on this point even if this Court does limit the application of *Breed* to its facts.

¹²²The language in the last two sentences of appellants' Brief at 21 suggests the latter, but their use of the sentence from *Breed*, which they quote in the middle of their Brief at 21, suggests the former.

involving only one jeopardy,¹²³ there is nothing in *Breed* which suggests that successive prosecutions within a juvenile court system would be governed by a rule different from the one that prohibits successive prosecutions in separate court systems. Under appellants' reading of *Breed*, that case would theoretically approve the prosecution of a child by a juvenile court judge on a charge for which he had already been acquitted by another juvenile court judge at an earlier time. This very result was rejected by the California Supreme Court in *M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971).¹²⁴ The thrust of *Breed* is that it was no longer tenable to conclude that jeopardy could not attach at a trial simply because it took place in the juvenile court. 421 U.S. at 529. It is wholly illogical to assume that this Court meant to state that it was "too late in the day" to conclude that a first jeopardy could not attach in juvenile court, but too early in the day for a second to attach in that court.

Finally, appellants seek to distinguish *Breed* on the ground that the master in the instant case makes no adjudication, but instead merely submits proposed findings to the juvenile court judge. Brief of Appellants at 22.¹²⁵ It is not clear precisely what appellants mean by the use of the word "adjudication," and the question is hardly clear under

¹²³See the discussion *infra*, at 63-86.

¹²⁴A year later, in *Bryan v. Superior Court of Los Angeles County*, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972), the California Supreme Court took the opposite position in a case involving the identical question which this Court resolved in *Breed*.

¹²⁵Whether the master submits "findings" to the judge, or merely "proposed findings", and the significance of this difference in terminology, is discussed *infra*, at 56-57.

Maryland law.¹²⁶ To the extent that appellants use that word to mean that the master has no power to enter a final order,¹²⁷ *Breed* is not inapposite.¹²⁸ In California the master is regarded as a subordinate judicial officer whose power to enter final orders is severely circumscribed.¹²⁹ Indeed,

¹²⁶See *Matter of Brown*, 13 Md. App. 625, 630-31, 284 A.2d 441, 444 (1971). See also §3-819(b); Rule 914.f.

¹²⁷Appellees discuss *infra*, at 78-80, the significance for double jeopardy purposes of the fact that a master's power to enter orders is limited.

¹²⁸Indeed, *Breed* illustrates how similar the powers of the master in Maryland and California are respecting the entry of final orders. It is clear from an examination of the record in *Breed* that, had the decision not been made to transfer Jones to the criminal court, the disposition in the juvenile court would have been commitment to an institution. See Appendix, *Breed v. Jones*, at 21-22. Under California statute, the judge must expressly approve the decision of a master to remove a child from his home. Cal. Welf. & Inst. Code, §249 (West 1977 Supp.). Thus an "order" by the master in *Breed* to commit Jones to an institution would have precisely the same effect as the "finding" of the master in Maryland to commit a child to an institution. See *infra*, at fn.129.

¹²⁹A comparison of the statutory provisions and court interpretations of Maryland and California juvenile law shows that the role and power of the master in California and the master in Maryland are nearly identical. Similar constitutional and statutory provisions authorize their appointment. Constitution of Maryland, Art. IV, §9; Constitution of California, Art. VI, §22; Ann. Code Md., Cts. & Jud. Proc. Art. (1974 and 1977 Cum. Supp.) (cited in this footnote as "Md.") §§2-102, 2-501, 3-813; Cal. Welf. & Inst. Code (West 1977 Supp.) (cited in this footnote as "Cal.") §247. Both have similar powers to conduct hearings. Md. §3-813; Md. Rule 911.a.2; Cal. §248. Both have a duty to make findings and conclusions and to issue orders or proposed orders which are to be transmitted to the parties and to the judge. Md. §3-813(b); Md. Rule 911.b; Cal. §248. In both states review by the judge of the master's findings may be sought. Md. §3-813(c); Md. Rule 911.c; Cal. §252. In Maryland the juvenile always has the right to a rehearing which may be on the record or *de novo* as he chooses. Md. §3-813; Md. Rule 911.c. In California the juvenile may be denied a

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appellants have referred to several California decisions as having "sanctioned the use of juvenile referees in much the

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hearing *de novo* but the judge must consider the record. Cal. §§252, 254; *In re Damon C.*, 16 Cal.3d 493, 546 P.2d 676, 128 Cal. Rptr. 172 (1976); *In re Edgar M.*, 14 Cal.3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975). In Maryland the State may be granted a rehearing on the record. Md. Rule 911.c. In California the State has no statutory right to request a rehearing, but in practice the judge will review the record if requested by the prosecutor and will grant a hearing *de novo* on his own motion. *Leach v. Superior Court for County of Los Angeles*, 98 Cal. Rptr. 687, 691-92 (Cal. Ct. App. 1971). In both states the judge may set aside the findings or order of the master and hold a hearing *de novo*. Md. §3-813(e); Md. Rule 911.d; Cal. §§253, 254. In Maryland the master has the power to issue an order for detention or shelter care prior to the adjudicatory hearing. Md. Rule 911.a.1, and between disposition and final review by the judge. Md. §3-813(d); the California master has similar power to issue temporary detention. *In re Edgar M.*, 14 Cal.3d 727, 738 n.8, 537 P.2d 406, 414, n.8, 122 Cal. Rptr. 574, 582 n.8 (1975). In cases where the California master is issuing an order removing a minor from his home (Cal. §249) or in California jurisdictions where the judge exercises his option to require all orders of masters to be expressly approved (Cal. §251), the master is on exactly the same footing as the master in Maryland. In other cases (Cal. §250), where the master has found the juvenile not guilty or is recommending probation, the California master appears to have greater power to issue a final order since he does, in fact, sign and issue the "order" while the Maryland master, in matters not involving detention, can issue only "proposed orders". In both states, however, the master's actions do not become final until the judge takes some steps, either by deciding not to disturb them or by setting them aside. In Maryland the judge must expressly adopt the master's findings (Md. §3-813(d)); in California approval of the master's orders by the judge need not be express if the orders do not remove a minor from his home (Cal. §249). The California Supreme Court has said, however, that where the juvenile has applied for a rehearing, giving effect to the master's orders by operation of law rather than by affirmative judicial act would violate the state Constitution since "[a] referee is constitutionally limited to the performance of 'subordinate judicial

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same way as the master functions in Maryland." Brief of Appellants at 22.¹³⁰

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duties.' " *In re Edgar M.*, 14 Cal.3d at 732, 537 P.2d at 410, 122 Cal. Rptr. at 578. The master's "orders" are only conditional and "in effect . . . subject to review and approval by such judge." *Bradley v. People*, 258 Cal. App.2d 253, 260-61, 65 Cal. Rptr. 570, 575 (1968); see also *In re Henley*, 9 Cal. App.3d 924, 930, 88 Cal. Rptr. 458, 461 (1970).

¹³⁰The three California cases which appellants cite, *Bradley v. People*, 258 Cal. App. 2d 253, 65 Cal. Rptr. 570 (1968), *In re Henley*, 9 Cal. App. 3d 924, 88 Cal. Rptr. 458 (1970), and *Jesse W. v. Super. Ct. of San Mateo Cty.*, 133 Cal. Rptr. 870 (Cal. Ct. App. 1976), hearing granted, No. SF23580 (Dec. 29, 1976), are all premised on the notion that there is one continuing jeopardy as the case proceeds from referee to judge. *Bradley* and *Henley* were rendered prior to this Court's decision in *Breed*. *Jesse W.* was decided after *Breed*, but the California Supreme Court granted review (No. SF23580 (Dec. 29, 1976)) and the case has been argued. Under Rule 976(d) and 977, Cal.R.Ct., a decision by the California Supreme Court to review a lower court opinion supersedes that opinion and it may not be published in the official reporter or cited by a court or party, except for purposes of law of the case doctrine. Thus *Jesse W.* has no precedential worth in California. Moreover, *Jesse W.* incorrectly distinguishes *Breed* on the theory that a juvenile court judge presided at the adjudicatory hearing and either subsequently made the adjudication or, in any event, remanded the juvenile to the criminal court for a second trial following the adjudicatory hearing before a master. 133 Cal. Rptr. at 873. The record in *Breed*, however, reveals that a master—not a judge—handled both of these functions. See Appendix, *Breed v. Jones*, 421 U.S. 519 (1975) at 17-19, 20-23. The only role ever played by a juvenile court judge in *Breed* was to preside at a collateral proceeding held to consider the petition for writ of habeas corpus that Jones filed. *Id.* at 36-45.

Appellants cite two other cases as further support for their position. The first, *People v. J.A.M.*, 174 Colo. 245, 483 P.2d 362 (1971), while suffering from the same infirmities as *Bradley*, is distinguishable since the parties there had an opportunity, pursuant to statute, to agree initially to have the hearing before a master instead of the judge. The *J.A.M.* court noted that by choosing to appear before the referee, the parties impliedly agreed to the procedure for a second hearing before

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2. The Requirements of the Maryland Constitution and Decisional Law

Quoting from the Maryland Constitution and citing *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974),¹³¹ appellants conclude that a master is entrusted with no part of the state's judicial power, that he is merely a ministerial officer and advisor to the court, that he may submit only proposed findings of fact and conclusions of law, and that he may be likened to the traditional master in chancery. Brief of Appellants at 15-17, 19, 22. Through these characterizations of the master and his role, appellants seek to further their position that the double jeopardy clause does not apply to the master's hearing. Such descriptions, however, are inaccurate and irrelevant.

The Maryland constitutional provision which appellants quote, Art. IV, §1, simply provides that the state's judicial power shall be vested in a series of courts which that constitutional provision enumerates. While the section does not list masters in describing how the judicial power is distributed,¹³² neither does it mention judges.¹³³ Thus, to

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the judge. 174 Colo. at 248-49, 483 P.2d at 364. See also the discussion in the Amicus Curiae Brief filed by the National Juvenile Law Center, at 7-11, 20. As noted earlier, see *supra*, at 24, the juvenile has no such choice in Maryland. The final case appellants cite, *Matter of Maricopa County, Juvenile Act. No. J-75658-S*, 26 Ariz. App. 519, 549 P.2d 614 (1976), relies, with very little analysis, on the *Bradley* opinion and never even cites this Court's opinion in *Breed*.

¹³¹See the discussion of *Matter of Anderson supra*, at 10-11.

¹³²The power of Maryland courts to employ masters, to the extent that power is not inherent, stems from the Constitution of Maryland, Art. IV, §9. See E. MILLER, EQUITY PROCEDURE (1897) at §555.

¹³³Appellants cite *Hagerstown v. Dechert*, 32 Md. 369 (1870) as holding that "the General Assembly could not vest judicial power in

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contend that a master in Maryland is not entrusted with the state's judicial power is somewhat misleading since that power is vested in institutions called "courts"¹³⁴ which are made up of numerous persons who are given a whole range of functions in connection with the exercise of judicial power. By making it seem as if the Maryland Constitution lists a series of persons who may exercise judicial power and a series of persons who may not, appellants push themselves into the use of phrases which seek to characterize the master as an incidental figure located somewhere in the murky depths of the judicial system.¹³⁵

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any other officer except those enumerated in the first section of the Fourth Article of the Constitution of Maryland". Brief of Appellants at 15 (emphasis added). At the time *Dechert* was rendered, Art. IV, §1 vested judicial power in a series of courts and in justices of the peace. That provision was subsequently amended to delete justices of the peace. See 1969 Md. Laws, Ch. 789 (ratified Nov. 3, 1970). The use of the word "officer" in *Dechert* stems perhaps from the existence at that time of the provision relating to justices of the peace.

¹³⁴Blackstone defined a "court" as being "a place where justice is judicially administered." 3 W. BLACKSTONE, COMMENTARIES *23.

¹³⁵Appellees acknowledge that, as the final arbiters of state law, state courts may create state law definitions which federal courts are bound to accept. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Brown v. Ohio*, 432 U.S. 161 (1977). It is equally well settled, however, that this Court, in exercising its constitutional authority under the supremacy clause, is the final interpreter of the United States Constitution. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Thus, a state court decision can not preclude this Court from considering whether an individual's constitutional rights have been infringed by "putting forward non-Federal grounds of decision that [are] without any fair or substantial support." *Ward v. Love County*, 253 U.S. 17, 22 (1920). See also *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Whatever questions involving purely state law matters there may be in the instant case, it is clear that the basic question presented by appellees involves the application of federal constitutional

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To minimize the master's role, appellants describe him as a mere "ministerial officer and advisor to the court." Brief of Appellants at 16. Whatever "form of words" might be used in describing the master's title, see *United States v. Hark*, 320 U.S. 531, 534 (1944),¹³⁶ the overwhelming

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principles. Hence, this Court should determine appellees' Fifth Amendment claim regardless of the resolution of the same claim by the Court of Appeals of Maryland in *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974). See *Aldridge v. Dean*, 395 F. Supp. 1161, 1169 (D.Md. 1975).

It is not entirely clear whether the court in *Anderson* based its decision on: 1) the legal conclusion that, under Maryland law, a master is not empowered to conduct a trial to which jeopardy can attach, or 2) the factual determination that an adjudicatory hearing before the master is so unlike a trial conducted by a judge that the implication of double jeopardy principles is precluded. To the extent that *Anderson* turned on the legal conclusion that the role of the master is "only advisory" (emphasis in original), 272 Md. at 102, 321 A.2d at 525, it is clear that the court "disregard[ed] substance because of the feeble enticement of . . . [a] label-of-convenience which has been attached to juvenile proceedings." *In re Gault*, 387 U.S. 1, 50 (1967). Adherence to constitutional requirements is "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). If, on the other hand, the court's opinion purported to describe what occurs as a factual matter at a master's hearing, and, on that basis, concluded that double jeopardy principles were not implicated, the evidence in the record in the instant case amply demonstrates the fallacies of such descriptions and conclusions.

¹³⁶In *Matter of Anderson*, the Maryland Court of Appeals noted, in summary, that it had cited cases "to the effect that a master is a ministerial officer, and not a judicial officer." 272 Md. at 106, 321 A.2d at 527. Yet one of its own decisions that it quotes from, *Bris Realty v. Phoenix*, 238 Md. 84, 208 A.2d 68 (1965), explicitly rejects an argument that a master is not a judicial officer. 238 Md. at 89, 208 A.2d at 69. The fact that various descriptive terms can be applied and withdrawn with such rapidity emphasizes the importance of concentrating on substance rather than form.

evidence demonstrates that the master presides over full trials and, for all intents and purposes, decides whether a child is innocent or guilty.¹³⁷

The emphasis on form reaches its pinnacle when appellants point out that the master may submit only "proposed" findings of fact, conclusions of law and recommendations to the judge. Brief of Appellants at 19, 22. The insubstantiality of this argument is perhaps best revealed by the fact that appellants in their own Brief unconsciously omit the word "proposed" in referring to "findings of fact and conclusions of law," even while trying to build up the significance of that word.¹³⁸ As noted earlier,¹³⁹ the word "proposed" was inserted in several places in the section of the juvenile court rules describing masters when the rules were revised in June, 1975, in an effort to comply with the decision of the court below in *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975).

It is difficult to think of a case in which form would be more exalted over substance than one in which a court would attach significance, for purposes of construing the double jeopardy protections of the Constitution, to the fact that the word "proposed" was inserted in the juvenile court rule. Indeed, the manner in which it was inserted emphasizes the lack of importance that should be attached to this draftsman's game. When the changes were made in June, 1975, the word "proposed" was inserted in four different places in the text of the revised master rule—

¹³⁷See *supra*, at 25-27, and *infra*, at 68-78.

¹³⁸See Brief of Appellants at 18, 22, where, on the latter page, appellants speak of "proposed findings" in one sentence, and "findings" in the very next sentence.

¹³⁹See *supra*, at 14-15.

immediately preceding each use of the phrase "findings of fact, conclusions of law". When the juvenile court rules were next revised two years later,¹⁴⁰ the master rule was amended to make both substantive and drafting changes. In making those changes, the drafters transferred a sentence in subsection c of the 1975 version to subsection a.2 of the current version. In addition, the text of that sentence was amended to delete the words "proposals and recommendations" and substitute the words "findings, conclusions and recommendations." Thus, with the federal district court's decision in *Aldridge v. Dean* now only a memory from an earlier year, the drafters of the revision neglected to insert the word "proposed" before the words "findings, conclusions and recommendations,"¹⁴¹ illustrating how attentive they were to the subtleties of the decision.

Having described the juvenile court master as a ministerial officer who may make only proposed findings and conclusions, appellants then likened him to the traditional master in chancery. Brief of Appellants at 16. This comparison is odd in that according to the settled law of Maryland, a master, unlike an examiner, is empowered to make findings. *Bris Realty v. Phoenix*, 238 Md. at 89, 208

¹⁴⁰See *supra*, at fn.8.

¹⁴¹While the drafters of the rule were tinkering with its language, deciding whether to insert or not insert "proposed", the Maryland General Assembly enacted a juvenile causes statute which contained a provision, §3-813, outlining the duties of masters. See *supra*, at 13. That section refers to the master's findings of fact and conclusions of law in three different places, never once using the word "proposed." Moreover, the legislature amended §3-813(d) in 1977, to add a sentence containing the words "findings, conclusions and recommendations," but again did not include the word "proposed". See 1977 Md. Laws, Ch. 259.

A.2d at 69. Moreover, the findings of a master in chancery are *prima facie* correct and may not be overturned unless clearly erroneous. *Id.* See also *Bar Ass'n. v. Marshall*, 269 Md. 510, 516, 307 A.2d 677, 680 (1973).¹⁴² Since appellants' previous position in the instant case has been that review of the juvenile court master's findings and conclusions should not be restricted by substantial evidence or clearly erroneous standards,¹⁴³ it is not apparent why they now seek to compare the juvenile court master with the master in chancery.¹⁴⁴

3. Jurisdiction of the Master to Adjudicate

Having characterized the master as a minor functionary, appellants contend that jeopardy cannot attach at a master's hearing since he has no power to decide innocence or guilt, and hence no jurisdiction to adjudicate. Brief of

¹⁴²In a recent case, the Court of Special Appeals of Maryland upheld a local court rule which permits a judge to act on a party's exceptions to the findings of a master in chancery without granting the party the right to a hearing before the judge on the exceptions. *Rand v. Rand*, 33 Md. App. 527, 365 A.2d 586 (1976), *vacated on other grounds*, 280 Md. 508, 374 A.2d 900 (1977).

¹⁴³See Reply Memorandum of Defendants, Respondents in *Brady v. Swisher*, Civil No. 74-1291 and *Aldridge v. Dean*, Civ. Nos. 74-1300—1308, filed on May 22, 1975, at 1-2. The memorandum is included in Vol. I of the original record in this Court as pleading no. 22.

¹⁴⁴When describing the role of the traditional master in chancery, appellants state that it is not "proper for the court to refer the entire decision of a case to [the master] without the consent of the parties." Brief of Appellants at 16. So that this statement creates no confusion, it should be emphasized that in the juvenile court, cases are placed before masters for trial without the consent of the parties (T.I. 87; T.II. 13).

Appellants at 19-20. Absent the risk of guilt determination, appellants argue, jeopardy does not attach. *Id.* at 18.

As one distinguished judge has said, "the legal lexicon knows no word more chameleon-like than 'jurisdiction'." *United States v. Sabella*, 272 F.2d 206, 209 (2d Cir. 1959). Appellants' jurisdictional argument is a good example. To the extent that the appellants use "jurisdiction" in the basic sense of subject matter jurisdiction, see *Montana - Dakota Util. Co. v. Northwestern P.S.C.*, 341 U.S. 246, 249 (1951), they can scarcely argue that there is an absence of subject matter jurisdiction when the juvenile court master conducts the adjudicatory hearing. If that were the case, most of the trials in the juvenile court each year would be void proceedings.

The juvenile causes statute specifies those classes of cases in which the juvenile court does or does not have subject matter jurisdiction. §3-804. That section defines the jurisdiction¹⁴⁵ of a "court", not a judge or master. Since a master specifically is authorized to preside at adjudicatory hearings, see Rule 911.a.2, he is the representative of the court and, therefore, subject matter jurisdiction does not disappear when he sits behind the bench.

If appellants use the phrase "jurisdiction to adjudicate" to mean that the master may not enter a final order, they correctly state the facts but then reach the wrong conclusion—that jeopardy does not attach at the master's adjudicatory hearing. Appellants correctly stress that there must be risk of guilt for jeopardy to attach. However, the

¹⁴⁵As is frequently the case, the jurisdictional section speaks in terms of "jurisdiction," not "subject matter jurisdiction." There can be no doubt, however, that the words "subject matter" are implied.

implication that there is no risk of guilt determination when the child is tried before the master, and hence, jeopardy cannot attach, is erroneous. Whether or not the master, himself, has the power to enter a final order adjudicating the child delinquent, surely there is no question that the juvenile undergoes "risk of a determination of guilt" when that hearing commences. *Serfass v. United States*, 420 U.S. 377, 391 (1975). Since the juvenile court judge signs the master's recommendation of delinquency in virtually 100 per cent of the cases (A.10-11), it is turning the world upside down to say that the child runs no risk of a determination of guilt when his hearing before the master commences.

Under the decisions of this Court, jeopardy attaches at a trial "if the court had jurisdiction of the cause and of the party. . . ."¹⁴⁶ *United States v. Ball*, 163 U.S. 662, 669-70 (1896). See also *Kepner v. United States*, 195 U.S. 100, 133 (1904); *Serfass v. United States*, 420 U.S. at 391. Whatever other defects may exist respecting the ability of the court to proceed to final judgment and sentencing,¹⁴⁷ and whatever language is used to describe the defect,¹⁴⁸

¹⁴⁶Appellants have never suggested that trial before the master results in defects in jurisdiction over the parties.

¹⁴⁷See, e.g., *United States v. Ball*, 163 U.S. 662 (1896) (defective indictment); *Benton v. Maryland*, 395 U.S. 784 (1969) (defective indictment); *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959) (absence of statutory authority to impose sentence).

¹⁴⁸In *Illinois v. Somerville*, 410 U.S. 458 (1973), an indictment which was defective under Illinois law led to the declaration of a mistrial after jeopardy had attached; subsequently, the accused was convicted under a new and valid indictment. This Court described the defect which caused the mistrial as "jurisdictional," 410 U.S. at 460, but nevertheless analyzed the case under the manifest necessity doctrine of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). As

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jeopardy nevertheless attaches at the beginning of the trial¹⁴⁹ unless the defect goes to subject matter jurisdiction itself.¹⁵⁰

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this Court recognized, the *Perez* doctrine does not become applicable unless jeopardy has initially attached. 410 U.S. at 467-68. Obviously the Court was using the word "jurisdictional" to refer to the kind of defect which existed in cases such as *United States v. Ball* and *Benton v. Maryland*, 395 U.S. 784 (1969), not to the absence of subject matter jurisdiction.

¹⁴⁹See *supra*, at 44-46.

¹⁵⁰Although the doctrine that jeopardy cannot attach in the absence of subject matter jurisdiction has deep roots which need not be cut away in the instant case, see *United States v. Ball*, 163 U.S. at 669 and authorities cited therein, the logic of the doctrine is certainly questionable. In *Benton v. Maryland*, 395 U.S. 784, 796 (1969) this Court stated, in response to the State of Maryland's argument that one cannot be placed in jeopardy by a void indictment:

This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this "void" indictment had he not appealed his burglary conviction.

See also *United States v. Sabella*, 272 F.2d at 208-09. Since *Benton* concluded that, at worst, the indictment was only "voidable," 395 U.S. at 797, it was unnecessary to face directly the question of whether one may be put in jeopardy by a proceeding which is totally void, as is the case when subject matter jurisdiction does not exist. However, the logic of the statement quoted from *Benton* applies equally to a totally void proceeding.

Rules respecting the attachment of jeopardy developed at a time when, at a first trial, defects less basic than absence of subject matter jurisdiction were held to have prevented an attachment of initial jeopardy. See *Vaux's Case*, 4 Coke 44, 76 Eng. Rep. 992 (K.B. 1590); 2 H. HAWKINS, PLEAS OF THE CROWN, 528 (1788); 4 W. BLACKSTONE, COMMENTARIES *335. At least since *United States v. Ball*, this Court has rejected that portion of the English common law which held that defects such as improper indictments prevented jeopardy from attaching at the first prosecution. Moreover, this Court

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Appellants' contention that jeopardy does not attach at the master's hearing necessarily raises the question of when it does first attach. According to their analysis, jeopardy first attaches when, at either a *de novo* hearing or a hearing on the record, the juvenile court judge begins to hear evidence. Brief of Appellants at 23.¹⁵¹ This reasoning would permit the reprosecution of a child for the same offense again and again in the juvenile court without offending double jeopardy principles so long as each trial takes place before a master and the involvement of the judge is limited to *ex parte*, *in camera* review of the master's findings and recommendations.¹⁵² Since relatively few cases that are set

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has long held that the need to protect against the strain, embarrassment, and expense of a criminal trial requires double jeopardy protection broader than the common law pleas of former conviction and former acquittal. See the discussion *supra*, at 35-37. Given these major changes in the law of double jeopardy as it has developed in this country, it is doubtful that past history alone should require adherence to the rule that jeopardy may not attach in the absence of subject matter jurisdiction.

¹⁵¹Referring to situations in which the State seeks a hearing before the judge on exceptions, appellants claim that jeopardy first attaches when the judge "receives the case from the masters. . . ." Brief of Appellants at 23. Appellees assume that "receives the case" means receiving evidence.

¹⁵²Conceivably appellants really meant to say that jeopardy may also attach in a case where no exception is taken, but that such attachment does not occur until the judge reviews the recommendation and signs the master's proposed order. Under this reasoning, some of the excesses of appellants' position would be avoided. However, even this modified approach is constitutionally impermissible. At a minimum, it is simply a resurrection of the common law rule, long since rejected in this country, that jeopardy attaches at the conclusion of the trial, not at the beginning. See the discussion *supra*, at 45. Although the common law view was followed in Maryland, see *Hoffman v. State*, 20 Md. 425, 434 (1863), the Maryland courts have recognized that that view did not survive *Benton v. Maryland*. See *Baker, Whitfield & Wilson v. State*, 15 Md. App. 73, 78, 289 A.2d 348, 351 (1972).

in originally before the master ever reach the judge for a *de novo* or on the record hearing because exceptions are taken,¹⁵³ only a very small percentage of children who are tried in the juvenile court would ever be in a position to invoke double jeopardy protections regardless of how often they are tried in that court for the same offense.¹⁵⁴

III. A SECOND HEARING BEFORE THE JUVENILE COURT JUDGE, FOLLOWING A TRIAL IN WHICH THE MASTER HAS FOUND THE CHILD TO BE NOT GUILTY, IS AN IMPERMISSIBLE SECOND JEOPARDY

Since it is clear that jeopardy attaches initially when the master, as fact-finder, begins to take evidence, the only remaining issue is whether the hearing before the judge constitutes a second jeopardy and is, therefore, forbidden

¹⁵³In calendar year 1974, the judge presided over eighty adjudicatory hearings prompted because exceptions were taken to a master's finding. During the same period, masters presided over 5,345 adjudicatory hearings. See P.Ex. 39, 40 at A.29,32.

¹⁵⁴In further support of their position that jeopardy does not attach at a master's adjudicatory hearing, appellants point out that no jeopardy attaches at a bail hearing, preliminary hearing, grand jury proceeding, or arraignment even though the defendant is required to marshal his resources and suffer the embarrassment, expense, and ordeal of defending himself. Appellants point out the absurdity of the contention that those proceedings invoke double jeopardy protections since in each of them the defendant "has not been *tried* before a court of competent jurisdiction." Brief of Appellants at 20. The very word that appellants italicize explains why jeopardy does attach at the adjudicatory hearing—it is the proceeding at which the child is *tried*.

by the double jeopardy clause.¹⁵⁵ There is no doubt that a second hearing held before a criminal court judge would be barred by double jeopardy under the narrow holding of *Breed v. Jones*, 421 U.S. 519 (1975). What must be decided is whether the second hearing before the juvenile court judge should be treated differently from the second hearing in *Breed* under a theory that the two juvenile court hearings are really one continuous hearing.

The only conceivable basis for claiming that the two juvenile court hearings merge when one party excepts to the master's findings and seeks a new hearing before the judge, is that the proposed order which the master submits is not signed by the judge. In considering the merits of that claim, appellees point out initially that if a child were found to be either guilty or innocent by a juvenile court judge, he could not, according to *Breed*, be tried on the same charge by another juvenile court judge.¹⁵⁶

Since the argument in the instant case opposing attachment of a second jeopardy in a proceeding before the judge turns on the meaning of the phrase "continuing jeopardy," an analysis of those words is in order. Appellees have previously noted that that phrase has come to stand for several propositions and, hence, causes confusion.¹⁵⁷ The

¹⁵⁵Appellees discuss *infra*, at 86-92, where there is any difference, for double jeopardy purposes, between a *de novo* hearing and a hearing on the record.

¹⁵⁶*M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); *People v. P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971). See the discussion *supra*, at 48-49.

¹⁵⁷See *supra*, at fn.100.

words are commonly associated with Mr. Justice Holmes' dissent in *Kepner v. United States*, 195 U.S. 100, 134-37 (1904) in which he stated that jeopardy should continue until all proceedings against a defendant are finally resolved. As used in that dissent, the concept has repeatedly been rejected. See *Breed v. Jones*, 421 U.S. at 534. The other use of this phrase—to indicate the justification for retrying a defendant who successfully attacks his conviction on appeal—is a much narrower and analytically distinct concept which has no relevance to the instant case. Appellants confuse the issue by stating "continuing jeopardy" was first given implicit recognition in *United States v. Ball*, 163 U.S. 662 (1896), Brief of Appellants at 23. The theory recognized in *Ball* only goes so far as to allow reprosecution when the defendant himself initiated a successful appeal of his conviction. This confusion is magnified by appellants' subsequent statement that "continuing jeopardy" was considered in *Kepner*. Brief of Appellants at 24. Clearly the theories considered in each case are vastly different and should not be lumped together. To the extent that "continuing jeopardy" is relevant to the instant case, it is the type formulated by Mr. Justice Holmes and repeatedly rejected by this Court.

Appellants attempt to distinguish this Court's uniform rejection of the Holmes "continuing jeopardy" concept by claiming that the proceedings before the master and judge are even more "continuing" and less interrupted than proceedings in earlier cases that have rejected "continuing

jeopardy.”¹⁵⁸ To support their contention that the master and judge hearings are continuous and uninterrupted,¹⁵⁹ appellants invoke the same argument that they presented earlier to support the view that no jeopardy attaches at the master’s adjudicatory hearing. Thus, appellants stress that the master’s recommendation of non-delinquency may not be equated to an acquittal or dismissal since it is not final. Brief of Appellants at 26, 28-29. Quoting from *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), which concluded that resolution of the question of whether there has been an acquittal should be determined, not by a label, but by whether some or all of the factual elements of the offense charged have been resolved, appellants claim that the master’s findings do not represent such resolution since they are conditional and may be rejected by the judge. Brief of Appellants at 29-30.

Appellants’ attempt to circumvent the discredited “continuing jeopardy” doctrine flies in the face of the overwhelming evidence in the record. Clearly, the decision of the master at the adjudicatory hearing does represent a resolution of the factual elements charged in the offense

¹⁵⁸See Brief of Appellants at 25, 29. Appellants also seek to gain acceptance for the Holmes view by suggesting that this Court in *Breed* left the door open for the application of the “continuing jeopardy” concept in a future case if the interest of society or the juveniles themselves would justify the cost of carving out an exception to normal double jeopardy rules. To the extent that appellants believe that the instant case presents the occasion, appellees point out, *infra*, at 92-98, why the occasion has not yet arrived.

¹⁵⁹In the cases of the six appellees who appeared before the judge at a second hearing, the average time span between the first and second hearing was just under two months. See P.Ex. 44-48, at 1; P.Ex. 49, at 3, 4, 6, 8, 16.

and, under any realistic assessment, is just as “final” as that made by the master in *Breed*. To conclude otherwise is to make the double jeopardy protection slave to a technical, automatic, and meaningless signature that the judge routinely places on the order form submitted by the master. But even if it can be assumed that, for double jeopardy purposes, the action of the master is not sufficiently complete to be designated as “final” for purposes of the attachment of a second jeopardy, the double jeopardy clause is nonetheless violated because the State, by taking an exception, prevents the child’s trial from being completed. The State then profits from this action because it receives a second, and constitutionally impermissible, crack before another judicial officer.

A. The Finding of a Juvenile Court Master, Whatever Its Label, That a Child Is Not Guilty of the Offense Charged, Should Be Viewed for Double Jeopardy Purposes as Concluding the First Jeopardy, Thereby Precluding any Further Attempt by the Prosecutor to Obtain a Guilty Verdict on the Same Charge Before Another Judicial Officer

Given the role that the master actually plays in the Baltimore City juvenile court, and the nature of the judge’s review of the master’s work, it is clear that at the end of the master’s adjudicatory hearing there is a final resolution of the issue of innocence or guilt. To require the signature of a judge on a printed order form before concluding that the first jeopardy has come to an end is to exalt form over substance in a matter wholly inconsistent with this Court’s teachings in cases developing the constitutional rights of

juveniles and the parameters of double jeopardy protections. See *In re Gault*, 387 U.S. 1, 50 (1967); *In re Winship*, 397 U.S. 358, 365 (1970); *Green v. United States*, 355 U.S. 184, 198 (1957); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 582 (1977) (majority and dissenting opinions). Moreover, the decisions of this Court do not require a signed order of the judge as a condition precedent to concluding an initial jeopardy.¹⁶⁰

1. In the Absence of Exceptions by the Parties, the Issue of Innocence or Guilt Is, in Every Meaningful Sense, Final When the Master Announces His Findings at the Conclusion of the Adjudicatory Hearing

Appellees have previously described generally the role of a master at an adjudicatory hearing and the numbers and kinds of cases which are heard by the seven masters and one judge in Baltimore City.¹⁶¹ From that evidence alone, it is clear that describing the master as merely an "advisor" on the issue of innocence or guilt is a fiction. A closer look at how his role is perceived by those who appear before him and the extent to which the judge becomes involved in the adjudicatory process¹⁶² further support this conclusion.

To the child and his parent, the role of the master in conducting the adjudicatory and disposition hearing¹⁶³—

¹⁶⁰This point is discussed *infra*, at 78-80.

¹⁶¹See *supra*, at 21-30.

¹⁶²Appellees are not speaking here of cases that the judge hears originally or on exception.

¹⁶³See *supra*, at 25-27.

and in taking actions which immediately affect the child's liberty¹⁶⁴—is so important that any practical difference between his role and that of the judge is totally obscured. The parent and child view the master as "judge" (A.23, 26; T.I. 255-56) and regard the adjudicatory hearing as a trial (A.26).¹⁶⁵ When the master announces his findings at the conclusion of the adjudicatory hearing, both parent and child react as though his decision was final. In the words of one master:

Normally, it's a reaction to the realization that I have decided that the youngster did or he didn't do it. The reactions may be from the complaining witness or from the respondent. Usually, he is happy if his charge is not sustained. He's said if it is. . . . If [at the disposition hearing] I'm recommending detention, the youngster may cry. He may get upset. His parents might get emotionally upset. A.22.¹⁶⁶

Ruth Kent, the mother of one of the appellees, testified that after the master announced that her son was not guilty, "I thought the case was over with and that I could take my

¹⁶⁴See *supra*, at 28-30.

¹⁶⁵The court in *Aldridge v. Dean* found that the child and his family justifiably regard the adjudicatory hearing as a trial since the master not only announces his findings on the issue of innocence or guilt but often causes the child to be either released from or taken into custody without waiting for any order of the judge. 395 F. Supp. at 1171 (Finding 28).

¹⁶⁶Another master stated that, both when he served as a public defender and appeared before all of the masters, and in his capacity as master, he observed similar reactions from the child and his parent (A.54). He "frequently heard statements from [the child] and his family at the conclusion of the master's adjudicatory hearing that they were relieved that the trial was over." (A.54).

son home and we could continue to live normal lives." (A.24). Her son told her that "he was glad that it was all over with because it was a long process of the procedures of the trial." *Id.* The parent of another appellee expressed similar views: "We was happy and relieved that it was all over with, so we thought everything was all over and we just left the courtroom and went home." (A.26).

That the respondent and his family view the master's findings as being final is particularly clear from their reactions when they discover that the case has not been concluded at all. The mother of one appellee stated that when she received a notice to report to court again:

I was totally upset. I could not understand getting a second summons in the mail stating that I would have to appear in Court for the second time, when at the first time that the case had been dismissed, my son was let go and, then, to be humiliated again, to go to Court and be subjected under those types of conditions, I was really upset, to no end. A.25.¹⁶⁷

While such reactions by the juveniles and their parents to a judicial proceeding do not, alone, determine whether jeopardy attaches or ends, they are helpful in realistically assessing the true nature of the master's role at the

¹⁶⁷The parent of another appellee stated that when she received another notice to bring her son back to court, she was

very upset because I knew William hadn't did anything else and I was wondering what was wrong, so I also worked for an attorney, so I called him and I asked him could he be tried for the same thing twice. A.26.

adjudicatory hearing.¹⁶⁸ Since the double jeopardy clause seeks, *inter alia*, to protect the defendant from having "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense," *Abney v. United States*, 431 U.S. 651, 661 (1977), the fact that the child and his parents suffer at the master's adjudicatory hearing in the same manner that an adult would in a criminal trial is relevant in determining how, for jeopardy purposes, the master's hearing should be characterized.¹⁶⁹

The view of the parent and child that the master's adjudicatory hearing is a trial at which the juvenile's fate is determined is fully supported by evidence showing the role that the judge plays in determining that fate. As already noted,¹⁷⁰ the ability of the judge to play any meaningful role during or after the master's hearing is extremely limited by

¹⁶⁸In their Brief at 19, appellants argue that the court below determined that jeopardy attached at the master's hearing because it engendered elements of anxiety, insecurity, and strain. That, according to appellants, puts the cart before the horse since other kinds of hearings that are held prior to trial also engender such elements but do not invoke double jeopardy protections. Appellants misconceive the district court's reasoning, which is that jeopardy has attached because the *trial* has commenced. The court's reference to elements of anxiety, insecurity, and strain were made in rebuttal of appellants' position that jeopardy cannot attach because the master cannot enter a final order. In other words, the court below was merely pointing out that these personal elements are present whether or not the master, himself, signs a final order.

¹⁶⁹The parents of two appellees further testified concerning the monetary costs incident to having to appear for a second time before the judge (A.25, 28).

¹⁷⁰See *supra*, at 27-28.

the enormous case loads of the masters and by the fact that the judge, himself, has a full docket of hearings as well as major administrative responsibilities. Thus, it would be surprising if the judge had more than a minimum amount of time remaining after fulfilling his other duties, to consider masters' findings and to contemplate the thousands of proposed orders he receives each year.¹⁷¹ In addition to sheer time and case load considerations, or perhaps because of them, the established procedures by which the judge passes on the actions of the masters ensure that his role is perfunctory and formal only.

Of the various sources of information available to the judge in making his review of the master's findings and recommendations, the most valuable and convenient is the master himself.¹⁷² Yet the judge virtually never speaks with

¹⁷¹See P.Ex. 41 at A.33; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 15).

¹⁷²The master's proceedings are now recorded by tape recorder. See *supra*, at fn.79. While the tape would theoretically contain the most accurate account of the proceedings, the practical difficulties of deciphering words that may be spoken by more than one person at once into four microphones (A.44) cause tape recordings to be less than ideal devices for conveying information. See Rodebaugh, *The Court Reporter vs. The Recording Machine—A Review of the New York Experiment*, 18 PRAC. LAW., No. 8, 69 (1972). In any event, it would require more than 24 hours each day for the judge to listen to all the tapes in their entirety that are made in each of the seven masters' courtrooms every day. It is, therefore, obvious that the judge cannot use the tapes in order to routinely review the masters' decisions. The judge who sat in the juvenile court after recording systems were introduced in 1975, stated that where he "feels the need, although this is done very infrequently, he actually will review a tape of the proceedings prior to signing a recommended order." (A.48-49). A close reading of his statement does not reveal that there actually ever was an occasion when he felt "the need".

masters regarding specific cases while they are pending before him (A. 21; T.I. 116-17, 151, 275-76). Indeed, from the summer of 1975, when a new judge was assigned to the juvenile court (A.44),¹⁷³ until the most recent period covered by the record,¹⁷⁴ six of the masters never discussed with the judge a single case that was pending either before them or before the judge (A.44, 49, 51). The seventh master on one occasion, and at his initiative, spoke to the judge about a case that was pending before the master, but the conversation did not discuss the facts of the child's adjudication or disposition (A.53). Like the other masters, he was never sought out by the judge to discuss a case (A.54).

Other possible sources from which the judge could draw information about the master's hearing have proved to be of little or no use. To the extent that masters take notes that they do not discard at the conclusion of a hearing, they do not send or otherwise bring these notes to the attention of the judge except in the rarest circumstances (A.13-14, 17, 53; T.I. 184, 275-76). Although the proposed order is submitted by the master to the judge for signature, it is a printed form that conveys no information whatever about the case except for the child's name and the petition number.¹⁷⁵

¹⁷³From May, 1967, until the summer of 1975, the juvenile court judge was the Honorable Robert I.H. Hammerman (A.44; T.I.93). He was succeeded by the Honorable Robert Karwacki (A.44-45) who served as juvenile court judge until September, 1977. See *The Daily Record*, Sept. 19, 1977, at 3, col. 4.

¹⁷⁴See *supra*, at 15.

¹⁷⁵See P.Ex. 51-62, 66-68. When several of the printed order forms were revised in 1975, even the words "master's report" were removed. Compare the aforementioned exhibits with P.Ex. 13, 15-17, 19, 30-32 and 34. This latter group of forms is no longer in use (T.II. 34-35). Illustrative of the proposed orders in the instant case are P.Ex. 5(E), 7(H), and 8(M).

The court file is likewise of no help to the judge since the bulk of material that it contains is papers which are strictly procedural in nature.¹⁷⁶ In any event, the judge virtually never sees the papers contained in the court file since it is very rarely submitted to him with the proposed order (T.I. 106, 150).

The written findings of fact, conclusions of law, and recommendations of the master which, pursuant to §3-813(b), must be filed with the court within ten days after the hearing,¹⁷⁷ could potentially prove the most useful to the judge in his review. However, after §3-813(b) was enacted in 1975¹⁷⁸ a written form was prepared whereby the parties could waive their right to receive written findings of fact and conclusions of law.¹⁷⁹ Except in those cases in which a child is detained for diagnostic evaluation¹⁸⁰ or in which the child is found delinquent and committed to an institution, it is very rare that the waiver form is not executed and, hence, no written findings and conclusions prepared (A.44, 48, 53;

¹⁷⁶See P.Ex. 1-9. Although the file includes a juvenile court petition on which the procedural history of the case is recorded, it contains no recitation of the evidence produced at the master's hearing (T.I. 181-82). See, e.g., the reverse side of P.Ex. 1(A).

¹⁷⁷Rule 911.b states that the written report shall be filed "with respect to adjudication and disposition". It would appear that the quoted language, which was added effective Jan. 1, 1977, see 3 Md. Reg. 1385 (1976), makes unnecessary a report when the petition is dismissed and no disposition hearing takes place. As noted in the text, *infra*, actual practice conforms to this interpretation.

¹⁷⁸See 1975 Md. Laws, Ch. 554.

¹⁷⁹The written waiver form is included in the record as P.Ex. 63.

¹⁸⁰These evaluations are made at the Maryland Children's Center. See Ann. Code Md., Art. 52A, §12 (1977 Cum. Supp.).

T.II. 17-19).¹⁸¹ Since commitment is recommended in only a modest percentage of cases,¹⁸² no written memorandum accompanies the proposed order submitted to the judge in the bulk of cases. Thus, the statutory requirement that written findings and conclusions be submitted is largely illusory. Indeed, since the statutory requirement went into effect, the percentage of cases in which a written memorandum of findings and conclusions has been submitted to the judge has actually declined. (T.II. 19-20).¹⁸³

Although memoranda are submitted to the judge in commitment cases, they are normally brief¹⁸⁴ and frequently have so little information in them concerning the

¹⁸¹If the master recommends commitment of a child who is already committed as a result of an earlier charge, he would not typically prepare a written memorandum but instead would have the parties execute a waiver form (T.II. 16).

¹⁸²See P.Ex. 50, 74 which, *inter alia*, show the number of children placed on probation and committed to institutions for calendar years 1974 and 1975, respectively.

¹⁸³Prior to the enactment of §3-813(b), memoranda had been submitted in no more than one-quarter to one-third of the cases in which a proposed order was submitted (T.I. 106 B). At that time, the current practice of submitting memoranda in cases in which children are detained for diagnostic evaluation or are committed was also followed (A.18; T.I. 120, 152; T.II. 17). The reasons that memoranda are now submitted in a smaller percentage of cases than they were prior to the passage of §3-813(b) are 1) that formerly masters as well as the judge presided at waiver cases (submission of a memorandum was more common in waiver hearings than in other hearings (T.II. 20)), and 2) most masters no longer follow the former practice of sending the judge memoranda in detention cases unless the child is detained for diagnostic evaluation (A.18, 43, 44, 51, 53).

¹⁸⁴The average memorandum is between one and one and a half pages in length (T.I. 118). See *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 23). For an example of such a memorandum, see P.Ex. 5(F).

commission of the offense itself that it would be difficult if not impossible for the judge to have any understanding of the nature or amount of evidence presented at the adjudicatory hearing (A.10, 53; T.I. 152-53).

In view of the demands on the juvenile court judge's time, the enormous case loads, and the rather minimal amount of information available to him when he receives proposed orders from the masters, it is not surprising that the judge's review is perfunctory at best (A. 9-10; T.I. 154-55). Although memoranda which are submitted by the masters in certain cases give the judge a somewhat greater opportunity to review disposition (A. 49; T.I. 120), on the whole the judge has little time or practical ability to conduct meaningful review of any of the masters' findings and recommendations (A. 9-10; T.I. 154-55). In the companion habeas corpus cases, the district court found:

The evidence shows and the State does not deny that, on the average, the judge devotes a little less than one minute to each proposed order. *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 24).

The perfunctory nature of the judge's reviewing function is revealed by the fact that virtually 100 percent of the orders submitted by masters are signed by the judge without modification (A.10).¹⁸⁵

¹⁸⁵The judge who presided in the juvenile court for eight years (T.I. 93) testified that on no more than four to nine occasions a year did he modify or remand a master's findings and recommendations (A.10). He further stated that in a majority of those four to nine occasions, he made the modification because an individual did not follow the normal route of taking an exception but instead spoke with him about the master's recommendation (A.11). See *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 25).

The evidence in the instant case fully supports the conclusion of the juvenile court judge who first addressed the issue before this Court.¹⁸⁶

[I]t is absolutely clear, and this Court knows only too well, that it is impossible for the Judge of the Juvenile Court of Baltimore City, who also carries a full docket of cases himself, to exercise any independent, meaningful judgment in the overwhelming majority of the many thousands of orders put before him each year—and that for the most part the signature—the stroke of finality—is no more than a perfunctory act. With this being the case it is difficult to see how realistically a Master can be called only an adviser, one who conducts only informal hearings and one whose powers and sanctions are nonexistent.

* * *

[I]t certainly appears that the Master conducts, for all intents and purposes, full blown and complete proceedings through the adjudicatory and dispositional phases and that as a practical matter he imposes sanctions and can effectively deprive youngsters of their freedom. *Matter of Anderson*, No. 158187 (Cir. Ct. of Balto. City, Div. for Juv. Causes, August 1, 1973) at 39.¹⁸⁷

This view was recently reiterated by the Commission on Juvenile Justice which spent 18 months studying, *inter alia*, the operation of the juvenile courts in Maryland. In its final

¹⁸⁶Having served from 1967-1975 as the only juvenile court judge in Baltimore City, and being one of only three full time juvenile court judges in the State of Maryland (T.I. 93-95), the Honorable Robert I.H. Hammerman was uniquely qualified to speak to the matter.

¹⁸⁷See *supra*, at fn.14.

report to the Governor and the General Assembly of Maryland, the Commission unanimously concluded:¹⁸⁸

All recommended orders of a master must be reviewed and signed by a juvenile court judge. The judge is deprived of the personal appearance before him of the parties and witnesses in making assessments as to the credibility of testimony. Additionally, the time constraints of heavy caseloads which justify the use of masters, also mean that the judge can usually give masters' reports no more than cursory reviews. So, without bearing legal responsibility for his decisions, the Master's recommended decisions become, in effect, final orders of the Court. FINAL REPORT OF THE COMMISSION ON JUVENILE JUSTICE TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF MARYLAND (Jan. 1, 1977) at 12-13.¹⁸⁹

2. The Finality Required for Initial Jeopardy to Terminate Is Not Dependent upon the Mere Technicality of the Judge's Signature on a Master's Proposed Order

If, as appellees contend, the master's finding of innocence or guilt is final as a matter of practice, all that keeps it from being technically final is the absence of the judge's signature on a proposed order form. However,

¹⁸⁸Three members of the Commission filed a dissenting report on an unrelated issue.

¹⁸⁹During his tenure as Chairman of the Commission, the Honorable Robert Karwacki also served as the Baltimore City juvenile court judge, having succeeded the Honorable Robert I.H. Hammerman. See FINAL REPORT at ii.

initial jeopardy may end even in the absence of a court's judgment or order formally discharging the defendant. *United States v. Ball*, 163 U.S. 662 (1896) illustrates this principle. In that case, a verdict of acquittal had been returned by the jury on a Sunday, and the trial court entered an order the same day discharging the defendant. He was subsequently retried and found guilty. Although noting that the order discharging Ball at the conclusion of the first trial was void since no judgment could lawfully be entered on Sunday, the Court ruled:

However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. 163 U.S. at 671.

Accord, Kepner v. United States, 195 U.S. 100, 130 (1904).

Admittedly, the trial judge is prohibited from overriding a verdict of acquittal in a jury trial where "the primary finders of fact are the jurors." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). While the verdict of acquittal in *Ball*, therefore, could not have been disturbed by the judge in any event, the findings of juvenile court masters—who are also the "primary finders of fact"—theoretically may be not only disturbed but also ignored by the judge.¹⁹⁰ Nevertheless, *Ball*

¹⁹⁰To the extent that the judge enters findings other than those recommended by the master, Fourteenth Amendment due process problems may be created. Unlike the master, the judge would have no opportunity to listen to live testimony, assess credibility, or study demeanor of witnesses. The problem was dramatically illustrated by the court in *United States v. Ricoy*, No. 7 Estafa (Ct. of 1st Instance for

(continued)

demonstrates that there is nothing magical, for double jeopardy purposes, in the fact that the proceedings have not yet reached the point of absolute finality that occurs when a judicial order is entered dismissing the juvenile court petition or, in adult court, when a judgment discharging the defendant is signed.

B. A Second Hearing Before the Judge Offends Double Jeopardy Principles Even if Masters' Findings That Have Not Been Signed by the Judge Are Viewed as Insufficiently Final to Terminate the First Jeopardy

As discussed previously,¹⁹¹ double jeopardy principles that have developed in this country recognize that even

(footnote continued from preceding page)

City of Manila, Aug. 20, 1903), reprinted in Brief for Plaintiff in Error in *Kepner v. United States*, 195 U.S. 100 (1904) at 49 *et seq.*:

Suppose a man is accused in Zamboanga and brought before a Judge of the Court of First Instance, given a right to cross-examine the witnesses there examined, and is acquitted by the Judge of the Court of First Instance. The case is appealed by the prosecution to the Supreme Court of the Philippine Islands. In Manila, five hundred miles away from where the accused may be in jail, by judges who have never seen him, and whom he has never seen, he is convicted upon evidence given by men whom the judges that convict have never seen, and not one of the witnesses has ever seen the judges that convict. The theory of the prosecution seems to be that that man has been confronted by the witnesses at the trial. *Id.* at 60.

For a full discussion of this issue, see Brief of the State Public Defender of California as Amicus Curiae in Support of Appellees in the instant case.

¹⁹¹See *supra*, at 38.

when the first trial does not run its full course, a second trial is permitted only if the reason for the aborted first hearing is justified under the "manifest necessity" doctrine of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). Under this doctrine, a hearing before the judge may offend the double jeopardy clause even if the master's findings are not viewed as having the requisite finality necessary to terminate the first jeopardy at the point when the master concludes that the juvenile is either innocent or guilty.

In view of the automatic nature of the judge's approval of the masters' findings,¹⁹² it is obvious that, but for the intervening act of the State in filing exceptions, the judge would have approved the master's findings in each of the appellees' cases.¹⁹³ Thus, by filing exceptions, appellants

¹⁹²See *supra*, at 76-78.

¹⁹³An examination of the court files of each of appellees' cases lends dramatic proof to this statement. On the back of the petitions in each case, there is a printed form where entries are made showing the procedural history of the case (T.I. 190-92). On the petitions in the cases of seven of the appellees, next to the word "order," is written the word "dismissed." See P.Ex. 1(A), 2(N), 3(F), 4(N), 6(U) (V), 7(N), and 9(V). Although the court files in several of the appellees' cases contain no order forms submitted to the judge, their absence is explained by the fact that for a considerable period of time orders were normally not submitted to the judge in cases in which the master decided that the petition should be dismissed (T.I. 364-68). Thus, absent exceptions filed by the State, the notation "dismissed" on the back of the petition would have terminated all further proceedings in the cases. In the files of two of the appellees, however, an order of dismissal was actually submitted to the judge who, in each case, signed it. See P.Ex. 5(E), 7(H). Moreover, orders dismissing the petitions were apparently signed in the cases of two other appellees although the record does not include copies. See *Matter of Anderson*, 20 Md. App. 31, 50-51, 315 A.2d 540, 551 (1974). Admittedly, those orders were prematurely signed since the time for the State to take an exception had not yet run. See *In re Appeal No. 287*, 23 Md. App. 718, 329 A.2d 420 (1974). Nevertheless, the fact that the orders were signed is conclusive proof that, but for the filing of the State's exceptions, these appellees would have been finally adjudicated not guilty.

caused each master's hearing to abort at its very end, immediately before the findings would almost certainly have been approved by the judge.

This Court's "manifest necessity" decisions demonstrate conclusively that no legal justification exists to deprive appellees of their "option to go to the first [fact-finder] and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn*, 400 U.S. 470, 484 (1971). In *Illinois v. Somerville*, 410 U.S. 458 (1973), this Court emphasized that when a trial is aborted, the defendant may invoke the double jeopardy protection when there is no "important countervailing interest of proper judicial administration." 410 U.S. at 471. Appellants' interest in causing the trials to be aborted¹⁹⁴ stems exclusively from their dissatisfaction with the masters' views on the facts and the law¹⁹⁵ and their desire to have another opportunity to prove appellees' guilt. However, as this Court said in *United States v. Wilson*, 420 U.S. 332 (1975), the prosecutor is not permitted to "seek to persuade a second trier of fact of the defendant's guilt after having failed with the first. . . ." 420 U.S. at 352.

The appellants sought to prevent each trial from reaching a conclusion terminating in a final order, not merely because it was going badly, *see, e.g., Gori v. United States*, 367 U.S. 364, 369 (1961), but because it had already been *lost*; all that was necessary for total finality was the stroke of a pen.¹⁹⁶ When a trial has progressed to

¹⁹⁴Since appellees' actions did not cause or contribute to the trials not being finally concluded, the principles set forth in *United States v. Dinitz*, 424 U.S. 600 (1976) have no application. *See also Lee v. United States*, 432 U.S. 23 (1977).

¹⁹⁵*See* P.Ex. 49 at 3-5, 7, 9, 12, 14-16.

¹⁹⁶*See supra*, at 77-78.

the point of virtual finality, the need to protect the defendant from reprosecution is much greater than when it is aborted near its start.¹⁹⁷ *See United States v. Gentile*, 525 F.2d 252, 256 n.2 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); Schulhofer, *Jeopardy and Mistrials*, 125 U.P.A. L. REV. 449, 507-11 (1977).

In these circumstances, the defendant has already been exposed to the strain and embarrassment of a complete trial, and the Government is past the point of speculating whether it will win or lose. The prosecutor's desire to hale the defendant before a new fact-finder to litigate the issue again is not the kind of countervailing interest of proper judicial administration which allows the invocation of the "manifest necessity" test. *See Ashe v. Swenson*, 397 U.S. 436, 446 (1970); *United States v. Jorn*, 400 U.S. at 482; *Gori v. United States*, 367 U.S. at 369; *United States v. Wilson*, 420 U.S. at 344.

The benefits to the appellants of a second opportunity before a new fact-finder are revealed by examining the trials of two of the appellees. At the initial trial of appellee Witherspoon, both the victim of a housebreaking and the police officer who interviewed the child at the police station testified (A.41-42). Although the child had confessed to the policeman,¹⁹⁸ the confession was not admitted in evidence after the child's mother testified that the waiver of rights

¹⁹⁷*Compare Illinois v. Somerville*, 410 U.S. 458 (1973), in which the trial was aborted in the earliest stages before any witnesses had been called, with *Klinefelter v. Superior Court of Maricopa*, 108 Ariz. 494, 502 P.2d 531 (1972), in which a mistrial was declared 5 to 10 minutes before the end of a two day trial.

¹⁹⁸*See* P.Ex. 9(T).

form that her son signed and the explanation given by the police were not understandable (A.42). In the absence of direct testimony implicating the child and because of questions concerning intelligent waiver of counsel at the police station, the master found the child not guilty (A.42).

Disagreeing with the master's assessment of the mother's testimony, the state's attorney filed an exception (A.42), and Witherspoon was retried before the judge. At the second hearing, the State presented a new witness who claimed that Witherspoon had confessed to him concerning the break-in (A.35-36). In addition, the police officer was called and allowed to present Witherspoon's confession (A.36-37). Defense counsel, however, did not present the mother's testimony on the question of whether the child had intelligently waived counsel because she was working and unable to be at the hearing (A.36-37). Defense counsel, however, did not present the mother's testimony on the question of whether the child had intelligently waived counsel because she was working and unable to be at the hearing (A.37-38). At the conclusion of the hearing the judge found the child guilty (A.39), and eventually committed him to an institution. See P. Ex. 9(A).

The second chance to prosecute enabled the State to strengthen its case with the testimony of a new witness who directly implicated Witherspoon and with additional testimony by an earlier witness concerning the confession. At the same time, the defense case was weakened because of the absence of a witness who had given key testimony at the hearing before the master.¹⁹⁹ Strengthening of the

¹⁹⁹Even if Witherspoon's mother had been present and testified at the hearing before the judge, he might have viewed her testimony in a light less favorable to the defense case than did the master and might therefore have still permitted the introduction of the confession into evidence.

prosecution's case is not a proper justification for retrial under the "manifest necessity" doctrine. See *Illinois v. Somerville*, 410 U.S. at 469.

The *McLean* case illustrates what may happen even when the evidence presented to the second fact-finder is exactly the same as that presented to the first.²⁰⁰ At the hearing before the master, the State presented the testimony of a 14 year old boy who claimed that McLean and another boy robbed him of his bicycle.²⁰¹ The victim further stated that he had not known McLean prior to the incident, although he had known the other youth.²⁰² In addition, a police officer testified that he spoke with McLean who denied any involvement.²⁰³ The defense called no witnesses.²⁰⁴ At the close of evidence, the master found McLean not guilty because he was not satisfied beyond a reasonable doubt of the accuracy of the witness' identification.²⁰⁵ Disagreeing with the master's finding on the identification issue, the prosecutor filed an exception and obtained a new hearing before the judge.²⁰⁶ At the new hearing, the same evidence was presented.²⁰⁷ This time,

²⁰⁰To the extent that Maryland law, at this moment, requires that the evidence presented to the second fact-finder be on the record, see *supra*, at fn.39, the *McLean* case illustrates the unconstitutionality of that procedure as well.

²⁰¹See P.Ex. 48 at 3-8; P.Ex. 49 at 16.

²⁰²See P.Ex. 49 at 16.

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶*Id.* See also P.Ex. 7(G).

²⁰⁷See P.Ex. 48 at 3-20. At the hearing before the judge, the State did not call the police officer, no doubt because at the first hearing he presented no useful information.

however, the second fact-finder evaluated the same evidence and concluded that he was convinced beyond a reasonable doubt that the victim had identified the right individual.²⁰⁸

Whether the master or the judge in the *McLean* case was more correct in assessing the worth of the victim's identification testimony is, of course, beside the point. The fact is that the most conscientious judicial officers can differ as to what constitutes reasonable doubt in a particular case and as to the interpretation of that concept. It is only logical to assume that if a case is tried before enough judicial officers, one of them will eventually conclude that the defendant is guilty beyond a reasonable doubt.²⁰⁹ However, such a process would emasculate this Court's decision in *In re Winship*, 397 U.S. 358 (1970). See also *North Carolina v. Pearce*, 395 U.S. 711, 734-35 (1969) (Douglas, J., concurring).

IV. THE SECOND HEARING DOES NOT ESCAPE CONDEMNATION UNDER THE DOUBLE JEOPARDY CLAUSE SIMPLY BECAUSE IT IS ON THE RECORD INSTEAD OF DE NOVO

Following the decision in *Aldridge v. Dean*, 395 F. Supp. 1161 (D.Md. 1975), the court rule which permitted the State to seek a hearing *de novo* before the judge was modified to provide that the hearing should be on the record, supplemented by such additional evidence as the

²⁰⁸*Id.* at 21-22.

²⁰⁹See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 280-81 (1972).

judge considers relevant and to which the parties do not object.²¹⁰ Assuming that the amended rule presently states the correct procedure for exception hearings,²¹¹ this alteration does not save the rule from unconstitutionality under the double jeopardy clause. Admittedly, restricting the State to the evidence it has already presented prevents it from strengthening its case by presenting either new witnesses or more thorough accounts from earlier witnesses. But there are other ways that the prosecutor may strengthen his case which are not precluded by restricting the hearing to the record. For example, the prosecutor might conclude that his witnesses, when viewed through the medium of a transcript or a tape recorder, will seem more credible than when viewed in person, or that testimony of defense witnesses might be less impressive when presented on the record than it was when presented live.²¹² Indeed, it is commonplace for a trial lawyer to make judgments as to whether to call a witness based not simply on his assessment of the witness' credibility but on how he thinks the fact-finder will assess that witness.²¹³

Furthermore, the prosecutor may strengthen his case by making new and improved arguments before the judge at the second hearing after the judge has listened to or studied

²¹⁰See the discussion *supra*, at 14-15.

²¹¹See the discussion *supra*, at fn.39.

²¹²The important role that personal observation plays in assessing the reliability of witnesses is discussed in the Brief of The State Public Defender of California As Amicus Curiae in Support of Appellees, at 18-26.

²¹³See H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING, 50-51 (1972); 2 A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, §278 (2d ed. 1971).

the evidence.²¹⁴ Moreover, defense counsel may prove to be less effective at the second hearing than at the first in referring to evidence or making legal arguments.²¹⁵

Assuming that the evidence and arguments presented at the second hearing are identical to those presented at the first, there remains the most fundamental objection to permitting the child to stand trial a second time—the possibility that a second fact-finder will simply take a different view of the evidence and find the child guilty.²¹⁶

²¹⁴The rule which authorizes hearings on the record, Rule 911, does not define “the record.” However, Maryland’s highest court has ruled that a record on appeal should not contain arguments of counsel. *Silverberg v. Silverberg*, 148 Md. 682, 694, 130 A. 325, 329 (1925). See also Rule 1326. To the extent that arguments made by counsel are not deemed part of the record presented to the judge at the second hearing, defense counsel would have an absolute right to make an argument, see *Herring v. New York*, 422 U.S. 853 (1975), and it is hard to believe that the judge would refuse the State a similar right.

²¹⁵Indeed, in a large urban area where the vast majority of children tried in the juvenile court are represented by a public defender’s office (A.47), the juvenile may have a different lawyer at his second hearing. Each of the appellees who was tried a second time was assigned a lawyer other than the one who handled the case before the master. Compare the reverse side of P.Ex. 1(A), 3(F), 5(N), 7(N), 8(S), and 9(V) with the cover pages of P.Ex. 44-48.

²¹⁶To the extent that the juvenile court judge at the hearing on the record is free to exercise his independent judgment on the issue of innocence or guilt without being restricted by the clearly erroneous standard normally employed by appellate courts (e.g., Fed. R. Civ. P. 52) or by trial courts reviewing findings of masters in chancery (e.g., Fed. R. Civ. P. 53(e)(2)), the chances that the judge will reverse the master’s findings are increased and double jeopardy principles more seriously offended. The appellants contend that the judge is required to make an independent determination, see *supra*, at 58, and the decision in *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974), while not explicit on the point, would seem to stand for that proposition. In California, where the laws providing for the use of juvenile court masters closely parallel those in Maryland, see *supra*, at fn.129, a recent appellate decision held that a juvenile court judge is required to exercise his independent judgment in reviewing a master’s finding. *In re Randy R.*, 67 Cal. App. 3d 41, 136 Cal. Rptr. 419 (1977).

Whether this changed result can be attributed to the fact that the case appeared stronger without live witnesses or to the fact that the judge simply interpreted the evidence differently might never be known. The effect, however, is the same: the State has increased its chances of eventually winning by giving another judicial officer a chance to assess guilt “in the hope that [he] would come to a different conclusion.” *Hoag v. New Jersey*, 356 U.S. 464, 474-75 (1958) (Warren, C.J., dissenting).²¹⁷

This Court has long recognized that double jeopardy protections cannot be circumvented simply by conducting the second hearing on the record. This precise situation was before the Court in *Kepner v. United States*, 195 U.S. 100 (1904). Kepner was tried in the court of first instance without a jury and was acquitted. Pursuant to military rules then governing the Phillipine Islands,²¹⁸ the United States appealed the conviction to the Supreme Court of the Phillipine Islands²¹⁹ where Kepner was tried again on the merits and found guilty.

Due to the influence of Spanish law,²²⁰ the review in the Supreme Court of the Phillipines was by retrial upon the

²¹⁷*Hoag* was overruled in *Ashe v. Swenson*, 397 U.S. 436 (1970).

²¹⁸See General Orders, No. 58, issued by the Office of the U.S. Military Governor in the Phillipine Islands on April 23, 1900. The full text of the orders is printed in the Penal Code Of The Phillipine Islands (1911).

²¹⁹Appeal by the United States was authorized by General Orders, No. 58, §44.

²²⁰Under Spanish rule and until the promulgation of General Orders, No. 58, the lower court had no power to enter a final judgment in a criminal case until the Supreme Court of the Phillipines had reviewed it. See *United States v. Flemister*, 1 Phil. Rep. 317, 319 (1902). That practice was changed by General Orders, No. 58, §50, which eliminated automatic Supreme Court review in cases in which the

(continued)

record with the Supreme Court free to make independent determinations on both legal and factual matters. See *United States v. Gimenez*, 34 Phil. Rep. 74, 77 (1916). See also *United States v. Wilson*, 420 U.S. 332, 356 (1975) (Douglas, J., dissenting). This Court reversed Kepner's conviction because his double jeopardy rights were violated.²²¹ The fact that the second hearing was on the record in the Supreme Court of the Philippines did not affect this Court's decision.²²²

Recently, this Court again examined the extent to which the Government may pursue a defendant at a second trial after losing at the first. In *United States v. Jenkins*, 420 U.S. 358 (1975), the trial court, after the close of evidence, filed findings of fact and conclusions of law, and ordered that Jenkins' indictment be dismissed. It was not clear whether the dismissal order was based exclusively on a legal interpretation or whether, in addition, the court was not satisfied that the Government had proved all of the elements of the offense.²²³ Thus, a reversal on the ground

(footnote continued from preceding page)

penalty did not exceed one year's imprisonment or a fine of 250 pesos. Automatic review was further limited a year later by Act No. 194 of the Philippine Commission, *Id.*

²²¹Although Kepner's contention was based on an Act of Congress which extended double jeopardy rights to the Philippines, this Court has since recognized that *Kepner* correctly stated Fifth Amendment double jeopardy principles. See *United States v. Wilson*, 420 U.S. 332, 346 n.15 (1975).

²²²An examination of General Orders, No. 58 reveals that the only mechanism for presenting evidence in addition to that already in the record when the case reached the Supreme Court of the Philippines was for that court to remand the case to the court of original jurisdiction for the taking of evidence. See General Orders, No. 58, §42; *United States v. Gimenez*, 34 Phil. Rep. at 77-78 (1916).

²²³The trial court's opinion did not contain a general finding of guilt. See 420 U.S. at 367.

that the trial court had misconstrued the law would have required that the court do more than merely reinstate a guilty verdict.²²⁴ The Government argued, however, that subsequent proceedings following reversal and remand "would merely be a 'continuation of the first trial.'" 420 U.S. at 368-69 (footnote omitted).

Pointing out that the Government's position rested upon an aspect of the "continuing jeopardy" concept that was articulated by Mr. Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195 U.S. at 134-37, but that has never been adopted by a majority of this Court, the Court ruled that

it is enough for purposes of the Double Jeopardy Clause,...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. *Even if the District Court were to receive no additional evidence*, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause.... 420 U.S. at 370 (emphasis added).

²²⁴In *United States v. Wilson*, 420 U.S. 332 (1975), decided the same day as *Jenkins*, this Court concluded that an appeal by the Government was proper where a jury had returned a guilty verdict and the trial judge dismissed the indictment on a post-trial motion on the ground that the defendant had been prejudiced by a delay between the offense and the indictment. The Court reasoned that since a reversal on appeal would have required only a reinstatement of the jury verdict and not a second hearing, the double jeopardy clause was not offended. See also *United States v. Morrison*, 429 U.S. 1 (1976).

See also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977); *Finch v. United States*, 433 U.S. 676 (1977).

Although a juvenile court judge at the second hearing will not, under the revised rule, normally receive additional evidence, obviously he will have to make not merely supplemental findings, but rather findings that are directly contrary to those made by the master on the ultimate issue of innocence or guilt. Therefore, under the *Jenkins* test, the double jeopardy clause would be violated.

V. THE INTERESTS AND ENDS OF THE JUVENILE SYSTEM ARE PROMOTED BY EXTENDING THE DOUBLE JEOPARDY PROTECTION TO JUVENILES TO PROHIBIT RETRIAL BY A JUDGE FOLLOWING A FINDING OF NOT GUILTY BY A MASTER

In concluding that juveniles are entitled to the protections of the double jeopardy clause, this Court, in *Breed v. Jones*, 421 U.S. 519 (1975), analyzed the double jeopardy protection in light of the test articulated in the plurality opinion in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Of prime concern were the importance of the right and whether application of it would impair "the juvenile court's assumed ability to function in a unique manner." 421 U.S. at 533 (citations omitted) (quoting *McKeiver*). Once the fundamental nature of the right was expressly recognized, it became important to analyze its potential impact on the juvenile court system to determine whether the interests of society or of juveniles would justify allowing an exception to the protection. 421 U.S. at 534-35.

During the course of this litigation, appellants have never asserted that elimination of the State's ability to except to a master's findings would, in any fashion, foster inflexibility, eliminate informality, or increase the clamor and adversariness of a juvenile proceeding. Indeed, they have advanced no interest, either of society, of the juvenile, or of the juvenile court system that would be promoted by allowing this exception to the principle that no individual shall be tried more than once for a single offense.²²⁵

To the contrary, the application of double jeopardy principles to the instant case would not be inimical to the system of juvenile justice and the operation of the juvenile courts. Indeed, it would further those very aims that prompted the development of this unique system.

First, elimination of the State's right to except would actually diminish clamor within the system by contributing to finality of decision-making. When a youth is found not

²²⁵On p. 24 of their Brief, appellants parrot the language from *Breed* that indicates that there might be circumstances which could justify exceptions to the double jeopardy protection. They do so, however, not to suggest that there are unique advantages to the practice that is currently being challenged that would justify it as an exception to the protection, but rather to advance the erroneous notion that this Court, in *Breed*, did not reject the concept of "continuing jeopardy" as originally articulated by Mr. Justice Holmes in *Kepner v. United States*, 195 U.S. 100 (1904). Appellants state that this Court merely declined to apply that concept in *Breed* but "seemed" to leave the matter open for further consideration in another case where special interests would justify acceptance of it. Not only have appellants overlooked this Court's re-affirmance that the Holmes view has never been adopted by a majority of the Court, 421 U.S. at 534, but they have also improperly construed this Court's position, that exceptions to the double jeopardy protection under proper circumstances may be justifiable, to mean that the Holmes theory of "continuing jeopardy" may be accepted under certain circumstances.

guilty by a master, court involvement with that youth would end, and the adversary process would be terminated.

Second, elimination of the State's right to except may further promote the goals of the juvenile court system in that a youth involved with the process will more likely perceive the system as a fair one. As was discussed earlier,²²⁶ both children and their parents normally view the master as the judge. They assume that he has the power to determine guilt or innocence and, if that determination is one of guilt, to order an appropriate disposition. When a child, found innocent by a master, is later ordered to report to court for another hearing on the same matter before a judge, he is likely to be confused and upset. Suddenly, a matter that he has reason to believe was settled is again the subject of court action. It is likely that a youth subjected to such a situation would believe that he has been treated unfairly. As this Court has stated, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). It has also recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 349 U.S. at 136 (citations omitted). More recently, in *In re Gault*, 387 U.S. 1, 26 (1967), this Court acknowledged that recent studies suggest that "the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."

This concept, the importance of which has long been recognized where adults are concerned, is even more

²²⁶See *supra*, at 68-69.

important in those instances when children are involved. While few representations are made to adults that the criminal justice system purports to do anything but punish anti-social behavior, that is not the case in the juvenile system. We have not yet discarded the promise that we hold out to juveniles of rehabilitation and treatment. See *McKeiver v. Pennsylvania*, 403 U.S. at 550-51. That promise, however, is undercut when the State deliberately creates a procedure which, on its face, must appear unfair to the child subjected to it. He may find it difficult to believe that the State's primary purpose is to assist him in coping with problems when he feels that he is being persecuted by a prosecutor whose main interest appears to be obtaining a conviction. Should conviction then result, the youth may, as the result of a belief that he has been treated unfairly, resist all treatment efforts offered him. See *In re Gault*, 387 U.S. at 26-27; Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. TOL. L. REV. 1, 19 (1974); Whitebread and Batey, *Juvenile Double Jeopardy*, 63 GEO. L.J. 857, 862 (1975). Such a result would clearly be counter-productive and in derogation of the purpose of the juvenile system.

Appellants, in essence, argue that a youth, because of age and inexperience, may be subjected to a procedure that would be intolerable in the adult system. The only reason they have ever advanced in support of this position is that if the master system is struck down by a federal court, the case load would be too burdensome for the sole juvenile court judge sitting in Baltimore City.²²⁷ Such an assertion is

²²⁷See the opinion of the court below, 436 F. Supp. at 1369. Appellants made such a claim in a "Post Trial Memorandum" filed in the companion habeas corpus cases on June 3, 1975. See Vol. I, pleading no. 18, of the original record in this Court, at 2-3. In their Brief in this Court, the claim is not repeated.

irrelevant since the viability of the use of masters is not in question in this case. The only issue before this Court is whether the Maryland procedure by which the State may except to a master's finding of innocence is unconstitutional.

However, even if an affirmance by this Court would encourage the demise of the master system, that possibility would not justify perpetuating a practice that denies children their constitutional rights, especially when there is no compelling reason for retaining that system. Indeed, abolishing the master system in Maryland is high on the priority list of those organizations that have been given the responsibility for recommending improvements in the operation of the state's juvenile courts.²²⁸ The REPORT OF THE COMMITTEE ON JUVENILE AND FAMILY LAW AND PROCEDURE TO THE JUDICIAL CONFERENCE (1976)²²⁹ has recommended

that the "Juvenile Master System" as now practiced be abolished and that all juvenile cases be handled by judges specially assigned to juvenile court, subject to a very limited use of masters in the juvenile court. *Id.* at 1.

In support of this recommendation the Report states:

No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the "step child" of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal

²²⁸See the discussion in the opinion of the court below, 436 F. Supp. at 1369.

²²⁹The Report is included in the record as Defendant's Exhibit 3.

behavior in general to be shunned and ignored as something beneath the dignity of a judge.

The goal of any court system is to provide justice in individual cases. In addition, in light of the volume of work facing the court system and proliferating caseloads, a justifiable goal is the provision of justice in an efficient manner. The "juvenile master system" raises serious questions with regard to both these goals. *Id.* at 1-2.

A similar conclusion was reached by the Commission on Juvenile Justice:

THE MASTER SYSTEM, AS PRESENTLY AUTHORIZED UNDER THE JUVENILE CODE, AND AS USED IN SOME OF THE COURTS THROUGHOUT THE STATE, SHOULD BE ABOLISHED. FINAL REPORT OF THE COMMISSION ON JUVENILE JUSTICE TO THE GOVERNOR AND GENERAL ASSEMBLY OF MARYLAND (Jan. 1, 1977) at 13 (capitalization in original).

In support of this recommendation, the Commission stated:

The Juvenile Masters System has been widely criticized on national and local levels. Most recently the Judicial Conference of Maryland called for its abolition in juvenile causes. The Maryland State and American Bar Associations, and the National Advisory Commission on Criminal Justice Standards and Goals, to name only a few organizations, have also urged an end to this practice.

More than any other factor, the use of masters in the juvenile courts is seen by the Commission as a major problem in the present system, according a lower level

of justice and consideration to children in the State, and lessening the court's credibility and image.

The Masters System not only evidences a "second class" status for juvenile causes, but is extremely inefficient, causing delays and duplication of work. The Commission acknowledges that there are many fine masters who would make good judges, but the problem is that they are *not* judges. *Id.* at 12.²³⁰

As the Commission noted, criticism of the master system is not confined to Maryland. Standard 8.3 of the NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION, REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976) advocates that all juvenile proceedings, including detention, waiver, adjudication, and disposition be heard only by a judge. *Id.* at 282. Likewise, the INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION (Tent. draft 1977) supports this position. *Id.* at 21.²³¹

²³⁰The Report further noted that a second hearing before the judge, following an exception by a party to the master's ruling often results in an

unnecessary duplication, wasting the time and money that the use of masters was intended to save, and raising the question of double jeopardy for the juvenile involved. *Id.* at 13.

²³¹For a further discussion of the position of various standard setting organizations on the use of masters, see *Amicus Curiae* Brief of the National Juvenile Law Center, filed in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the district court be affirmed.

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